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91-1124

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE HAVASUPAI TRIBE,
a Federally Recognized Indian Tribe, et. al.,

v.

THE UNITED STATES OF AMERICA, et. al.,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. The Grand Canyon Enlargement Act, 16 U.S.C. 228i et. seq. added 185,000 acres to the Havasupai Indian Reservation and specifically recited that:

> Nothing in Section 228a-228j of this title shall be construed to prohibit access by any member of the Tribe [Havasupai] to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not covered in Section 228a to 228j of this Title. Id. 228i(c).
>
> * * *
>
> By the enactment of sections 228a to 228j of this title, the Congress recognizes and declares that all right, title and interest in any lands not otherwise declared to be held in trust for the Havasupai Tribe or otherwise covered by sections 228a to 228j of this title is extinguished.

Does the language and the legislative history of the Act, when interpreted under tenets of construction adopted by this court affecting Indian Tribes, preserve or provide access by Congress to the Tribe or individual Tribal members to

the Canyon Uranium Mine site, notwithstanding a prior decision of the Indian Claims Commission.

2. Is a showing of agency bad faith a prerequisite to discovery in a suit seeking judicial review of administrative agency action where the applicant seeking discovery has challenged the completeness of the administrative record and seeks to establish its completeness through such discovery.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners: The Havasupai Indian Tribe, a Federally recognized Indian Tribe; Delmer Uqualla, Issa Uqualla, Clark Jack, Jr., Rex Tilousi, and Wayne Sinyella.

The Respondents before this Court include: Chief, United States Forest Service; Regional Forester, Southwestern Region, United States Forest Service; Forest Supervisor, Kaibab National Forest, Southwestern Region, United States Forest Service; Energy Fuels Nuclear, Inc., a Colorado Corporation; Energy Fuels Exploration Company, a Colorado Corporation; United States of America, the United States Department of Agriculture, Forest Service; Secretary of Agriculture.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE HAVASUPAI TRIBE,
a Federally Recognized Indian Tribe, et. al.,
Petitioners,

v.

THE UNITED STATES OF AMERICA, et. al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit has not yet been reported. It appears in the Appendix hereto, p. A-3, infra.

The opinion of the United States District Court for the District of Arizona (Strand D.J.) is reported at 752, F. Supp. 1471 (D. Ariz. 1990) and is reprinted in the Appendix hereto, p. a-14.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1362, 28 U.S.C. § 1331, the Petitioner brought this suit in the District of Arizona. On April 18, 1990, the District of Arizona granted Judgment in favor of Respondents on all Counts of Petitioner's Complaint.

On Petitioner's appeal, the Ninth Circuit on August 26, 1991, entered a Judgment and an Opinion affirming the decision of the District Court. A Petition for Rehearing was filed with the Ninth Circuit on September 6, 1991. The Petition for Rehearing was denied on October 9, 1991.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Grand Canyon Enlargement Act, 16 U.S.C. § 228i provides in pertinent part:[1]

> Nothing in sections 228a to 228j of this title shall be construed to prohibit access by any members of the tribe to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not otherwise covered in sections 228a to 228j of this title.
>
> * * *
>
> By the enactment of sections 228a to 228j of this title, the Congress recognizes and declares that all right, title and interest in any lands not otherwise declared to be held in trust for the Havasupai Tribe or otherwise covered by sections 228a to 228j of this title is extinguished.

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[1] The statute is set forth in full at Appendix p. a-144.

STATEMENT OF THE CASE

The Petitioner, Havasupai Indian Tribe, is a federally recognized Indian Tribe which resides on a federal Indian Reservation located in the Grand Canyon of Arizona. Petitioners, Delmer Uqualla, Issa Uqualla, Clark Jack, Jr., Rex Tilousi, and Wayne Sinyella are members of the Havasupai Tribe and, in some instances, Tribal officers. Petitioners will be collectively referred to as "the Havasupai Tribe" for purposes of this Petition.

The Havasupai Tribe has lived within the area of the Grand Canyon for thousands of years. This Petition seeks review of decisions of the Ninth Circuit affirming the decision of the District Court denying the Tribe an opportunity to take discovery in an originally filed District court action alleging, inter alia, violation of Tribal rights, and violation of a right of access to sacred areas conferred by Congress under the

Grand Canyon Enlargement Act of 1975, 16 U.S.C. § 228i ("GCEA"). The denial of discovery also applied to separate claims made by the Tribe against Energy Fuels Nuclear which were not part of the administrative process.

In October, 1984, Energy Fuels Nuclear (EFN), filed with the United States Forest Service, Kaibab National Forest, a Plan of Operation for development of the Canyon Uranium Mine. The Canyon Uranium Mine is located approximately 35 miles Southwest and upstream of the Havasupai Reservation. It is undisputed that the Canyon Mine Site is located within the aboriginal use area of the Havasupai Tribe and is located on public land within the Kaibab National Forest.

On September 26, 1986, the Forest Supervisor, Leonard Lindquist, issued a Record of Decision approving EFN's modified Plan of Operation for the Canyon Mine. Pursuant to 36 C.F.R. § 211.18, the Tribe appealed the Forest

Supervisor's decision to the Regional Forester. The Regional Forester affirmed the Forest Supervisor's decision on August 28, 1987. The Chief of the Forest Service affirmed the Regional Forester's Review on June 9, 1988.

The undisputed chronology of events reflects review of the EFN Plan of Operation by three separate levels within the Forest Service during the period from October, 1984 through June 1988.

On June 16, 1988, the Tribe filed suit challenging the authority of the Forest Service to approve a Plan of Operation for the Canyon Uranium Mine. The Complaint alleged violation of first amendment rights to freedom of religion; violation of right of access; breach of fiduciary duty by the Forest Service; and violation of the National Environmental Policy Act, 42 U.S.C. § 4321 regarding deficiencies in the preparation of an Environmental Impact Statement for the

Canyon Uranium Mine. The Complaint further alleged that development and operation of the Canyon Uranium Mine by Energy Fuels Nuclear would unlawfully deny the Tribe's access to a place held sacred and religious by them and would violate their aboriginal right of access acknowledged, confirmed, and reserved by the United States for the beneficial use and enjoyment of the Havasupai Tribe.

This District Court, in a preliminary ruling dated July 28, 1988, ordered that any evidence not within the "Administrative Record" would not be admitted and that the Tribe was barred from taking any discovery, of any kind, including discovery of the Forest Service papers, documents, or any company or individual listed in the EIS as a "preparer" and also prohibited the Tribe from taking discovery from EFN or admitting evidence relating to the separate claims against EFN.

The Tribe thereafter on August 12, 1988 moved for production of the entire

Administrative Record which was denied by the District Court on September 8, 1988.

On April 18, 1991, the District Court entered a comprehensive order denying the relief requested by the Tribe under all counts and affirming the decision of the Chief of the Forest Service approving the modified Plan of Operation for the Canyon Uranium Mine.

On appeal to the Court of Appeals, the Tribe raised three issues:

1. Whether the District Court's denial of any discovery or introducing evidence was error;

2. Whether the District Court erred in finding that the Environmental Impact Statement for the Canyon Mine contains a reasonably thorough discussion of the Canyon Uranium Mine Proposal; and

3. Whether the District Court erred in finding that the Grand Canyon Park Enlargement Act of 1975 did not preserve for the Tribe a right of access to the Canyon Uranium Mine Site.

The District Court determined that the language of the GCEA provided no basis for a claim of a right of access since aboriginal

title had supposedly been "extinguished" through a determination of the Indian Claims Commission. The Havasupai Tribe et. al. v. United States, 20 Ind. Cl. Comm. 210, 234 (1968). Significantly, the District Court also stated in its opinion that an extinguishment depends upon the action of Congress and not by any activity of the executive branch[2] and that the Commission had no authority itself to extinguish title.[3]

The Ninth Circuit, in its opinion of August 26, 1991 affirmed the holding of the District finding that aboriginal title had been extinguished citing United States v. Gemmill, 535 F.2d 1145, 1148-49 (9th Cir.) Cert. den. sub. nom. Wilson v. United States, 429 U.S. 982 (1976). In applying the rationale advanced in Gemmill, the Ninth Circuit did not point to a specific Act of

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2 District Court Opinion p. a-25.

3 Appendix p. a-29.

Congress which clearly and unambiguously extinguished aboriginal title, but instead examined a series of events regarding activity before the Indian Claims Commission.

Significantly, the Ninth Circuit, as well as the District Court failed to explain or comment upon the necessity or operation of § 228(f) of the Act which provided:

> By the enactment of the Sections 228a to 228j of this title, the Congress recognizes and declares that all right, title, and interest in any lands not otherwise declared to be held in trust for the Havasupai Tribe, or otherwise covered by Section 228a to 228j of this title is extinguished.

Both opinions failed to explain the determination of Congress that a declaration of extinguishment of aboriginal title was necessary as found in 16 U.S.C. § 228i(f) in light of the earlier extinguishment suggested in both opinions.

The Ninth Circuit Court's opinion also did not comment or explain how its affirmation

of the District Court's interpretation of the GCEA could be reconciled with the Ninth Circuit's earlier analysis of the GCEA as evidence of Congressional action to protect and preserve access to religious sites.[4]

The Ninth Circuit also affirmed the District Court's determination that the Tribe would not be entitled to any discovery (even discovery to determine if the entire administrative record was in fact before the reviewing District Court) since no showing of bad faith had been made or that the administrative officer had relied on materials outside of the record.[5] The Ninth Circuit further noted that discovery beyond the administrative record is permitted where it is clear that the agency considered documents

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[4] Northwest Indian Cemetery Protective Association v. Peterson, 795 F.2d 688, 694 n.8 (Ninth Cir. 1986) reversed sub. nom. on other grounds. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

[5] Appendix p. a-9.

outside of that record when arriving at its conclusion.[6] The Ninth Circuit opinion did not comment upon or explain why the "administrative record" produced by the Forest Service did not include thousands of pages of additional records on the Canyon Uranium Mine in the admitted possession of the Forest Service, but never included in the record.

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[6] Appendix p. a-9.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Interpretation of the Havasupai Access Provisions of the GCEA Conflicts With Decisions of this Court.

Without Congressional authorization, and contrary to an express extinguishment by congress in the subject statute, the Ninth Circuit has determined that executive action taken by a quasi judicial board such as the Indian Claims Commission has extinguished aboriginal title and therefore denied access to the Havasupai Tribe to a sacred site despite a specific Congressional statute which (a) recognizes such access, and (b) by express language "extinguishes" aboriginal title (as only Congress can do).

This petition raises an important question of first impression before this court warranting exercise of the court's jurisdiction regarding construction of the GCEA and its recognition of the Havasupai Tribe's right of access to the Canyon Uranium Mine site. See American Federation of Musicians v.

Wittstein, 379 U.S. 171, 175 (1974). Both the District Court and the Ninth Circuit determined that the Indian Claims Commission extinguished all rights that the Havasupai Tribe might have to the Canyon Mine site, yet this court has determined that the executive branch does not have jurisdiction to extinguish title, that power rests exclusively with Congress. U.S. Ex. Rel. Hualapai Indians v. Santa Fe Pacific Railroad Co., 314 U.S. 338, 347 (1941). Pursuant to Article I, Section 8.3 of the United States Constitution, on Congress has the power and authority to extinguish title. The unilateral action of the executive branch cannot eliminate Indian title. Turtle Mountain Band of Chippewa Indians v. U.S., 490 F.2d 435, 945 (Ct. Cl. 1974).

The unique status of Indian Tribes and their relationship with the United States has created a body of law established by this court for the construction of statutes

affecting Indians are to be liberally construed in their favor. Bryan v. Itasca County, 426 U.S. 373 at 391 (1926); Alaska Pacific Fisheries v. U.S., 248 U.S. 78, 89 (1918). Doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of the concerned Indian Tribe. Choate v. Trapp, 224 U.S. 665 (1912). Neither the District Court, nor the Court of Appeals opinions included any discussion of the application of this rule of construction to Section 228i of the GCEA.

The Forest Service does not dispute that the Tribe has a religion, nor does the Forest Service take issue with the fact that the Canyon Mine site may have special significance to that religion. Section 228i(c) does in fact reserve to the Tribe access rights to "sacred or religious places" greater than those of the public. The District Court simply interpreted the words as an expression of statutory neutrality[7] and a preservation of

access by the Tribe similar to that enjoyed by any member of the public.[8]

The primary factors for a court to consider to determine Congressional intent respecting this issue are: (1) the statutory language of the GCEA; (2) the events surrounding its passage; and (3) the subsequent treatment of the land after passage of the Act. Solem v. Bartlett, 465 U.S. 463 (1984). A review of the language of the GCEA and the events surrounding its passage as well as the Havasupai use of land in their aboriginal area after the Indian Claim Commission decision shows Congress' intent to confirm and preserve a right of access to sacred places found in § 228i(c) of the GCEA.

Congress intended to make clear that by extinguishing all right, title, and interest of the Havasupai Tribe to lands not in the

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[7] District Court Opinion p. a-50.

[8] District Court Opinion p. a-50.

enlarged Reservation or in the "Havasupai Use Lands" in the Grand Canyon National Park, it was preserving or allowing right of access by members of the Tribe to any sacred or religious places or burial grounds, paints, materials, and medicines on public lands.

Two entire provisions of the GCEA are rendered superfluous by the District Court's opinion: Sections 228i(c) and 228i(f). Congress had no need to provide access to public lands by the Havasupai equal to that of any other member of the public, since nothing in the GCEA prohibited access of the Havasupai Tribe. If all rights of the Havasupai through aboriginal title had been extinguished via the Indian Claims Commission, Congress would have needed no express extinguishment as found in § 228i(f).

The legislative history of the GCEA shows that protection of the Havasupai Tribe living in and around the Grand Canyon was considered "first and foremost" by the sponsors of the

Act.[9]

Specifically, Congress indicated that the Havasupai were regarded by other Indian Tribes as "the keepers of the Grand Canyon and its sacred places".[10]

The actual return in trust to the Havasupai of some of their plateau lands and sacred places was considered "essential".[11]

The fact that "most, but not all, of the restorations sought by the Havasupai people"[12]

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[9] 119 Cong. Rec. No. 43 (daily ed. March 20, 1973), Statements on Introduced Bills and Resolutions.

> By Mr. Goldwater (for himself, Mr. Beall, Mr. Brock, Mr. Buckley, Mr. Curtis, Mr. Dominick, Mr. Ervin, Mr. Fannin, Mr. Hatfield, Mr. Helms, Mr. Hollings, Mr. Hruska, Mr. Humphrey, Mr. Javits, Mr. Kennedy, Mr. Mansfield, Mr. McGovern, Mr. Moss, Mr. Packwood, Mr. Percy, Mr. Scott of Pennsylvania, and Mr. Thurmound).

[10] Id., Goldwater, at 2.

[11] Id., Goldwater, at 2.

[12] Id., Goldwater, at 2. (Cont.)

were being restored in trust to the Tribe was clear.

The legislative history of the GCEA reflects that Congress clearly understood that the Havasupai Tribe's situation and history was unique.[13] Even after the claims case which the Ninth Circuit held as pivotal, Congress recognized that the Havasupai continued to use large areas of the Grand Canyon National Park and Kaibab National Forest,[14] and expressly sanction Havasupai

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13 The House of Representative's Report on the GCEA stated:

> "The Havasupai situation is unique. The Indian Claims Commission allowed them compensation for their aboriginal lands without offset, even though they continued to use a rather large area for grazing to the exclusion of others. Moreover, Congress expressly sanctioned the use of lands within the Grand Canyon National Park by members of the Havasupai Tribe . . .". (H.R. Rep. 93-1374, 93rd Cong. 2nd Sess. 9 (1974)).

(Cont.)

Tribe use of lands within the aboriginal area.

Moreover, a review of floor debate on th GCEA clearly demonstrates that the claim of prior extinguishment of Havasupai aboriginal title through action of the Indian Claims Commission was raised as a major objection to the Act due to the possible precedential effect of a transfer. The continued uses mad by the Havasupai of the National Park and National Forest was intensely debated. It ha "become an emotional national issue."[15]

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[14] Id. at 8.

[15] 119 Cong. Rec. H6683 (1974), Udall:

> There are, in my opinion, equities on both sides of what has become an emotional national issue. There has been a great deal of debate over whether or not the Havasupai Tribe's aboriginal title to this land was extinguished by a 1969 settlement before the Indian Claims Commission whereby the Tribe agreed to accept $1.24 million for its claim that 2.5 million acres were "taken" by the U.S. Government.

(Cont.)

The Trial court, which attributed the purpose of § 228i(c) as being merely a statement of neutrality showing that the Havasupai were to have the same rights as other members of the public, ignored the extensive debate where opponents argued that no statutory language was necessary to preserve the uses that the Havasupai were acknowledged to still be making of park and forest lands, including religious uses.[16]

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* * *

> Advocates for the Tribe point out that the Claims Commission has no authority to extinguish aboriginal title, that only Congress can do so. Indeed, as the Supreme Court has stated, "the power of Congress in that regard is supreme." (U.S. v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941). Congress is the final arbiter of matters of Indian land title and can create, enlarge, or modify Indian reservations as it deems necessary.

[16] 119 Cong. Rec. H10449 (1974). See, Yates, Rhodes, and Udall at H10439, H10440; see also Foley, Dellenback, and Steiger at H10441; see (Cont.)

A major sponsor of the GCEA emphasized the purpose was to protect the rights of the Havasupai.

> There are two reputable, responsible points of view here. I take the view that we will do justice to the tribe today by voting up the committee amendment. The purpose is to protect the legitimate rights of the Indians.[17]

Finally, the debate and previous action by Congress recognized the disagreement about whether title had been extinguished by the Indian Claims decision, or the appropriation of the judgment award by Congress.[18]

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also, Seiberling, Udall, Foley, Rhodes at H10442; see also, Meeds, Steiger, Rhodes at H10443.

[17] Id., 119 Cong. Rec. H10449 (1974), Udall:

[18] Id., 119 Cong. Rec. H10441 (1974), Foley:

> I would like to emphasize that the money has been appropriated by the Congress, it has been partially distributed to the Tribe, and the claim is therefore fully and legally settled. [Emphasis added].

For those insisting that title had already been extinguished, the earlier Committee Report states that:

> "this action is in the nature of a grant by the Congress, and since the uses to be permitted are limited, the legislation requires no consideration to be paid by the tribe for the benefits conferred and it finally settles the question of title to the land. [Emphasis added].[19]

For those claiming title had not been extinguished, Congress preserved limited rights to the Havasupai on public lands not covered by 16 U.S.C. 228i with the language of § 228i(c).

Finally, Congress determined that the question of title must be resolved and included the express provision of 16 U.S.C. § 228i(f).

II. Denial of Discovery to the Tribe to Determine Completeness of the "Administrative Record" Before the Trial

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19 H.R. Rep. No. 93-1374 93rd Cong. 2d Sess. 11 (1974).

Court Conflicts With Decisions of this Court.

What the Forest Service labeled as the "Administrative Record" complied during the Havasupai Tribe's administrative appeal of th forest Supervisor's September 26, 1986 decision to approve the Canyon Uranium Mine, the District Court below did not find, and th Forest Service has never contended that the "Administrative Record" filed in this case contains all documents and materials directly or indirectly considered by the Forest Servic in the investigation, review, and approval of the Plan of Operation for the Canyon Uranium Mine.

In briefing before the Ninth Circuit, Respondent Energy Fuels Nuclear ("EFN") contended that the record before the District Court comprised all the material before the Chief of the Forest Service when a final decision was made on June 6, 1988. EFN cited in the record to two declaration of Forest

Service personnel, Mr. Branson and Mr. Unger. But neither of these declarations support the claim of EFN that the administrative record before the Trial Court contained all materials that was before the Forest Service Chief before the Ninth Circuit.

At the Ninth Circuit the Forest Service contended that, pursuant to 36 C.F.R. § 211.18(f)(6), the Chief's June 6, 1988 decision was "final agency action" and therefore the administrative record" only need include those documents actually relied upon. EFN argued that only final agency actions are reviewed by courts and not decisions which are preliminary or procedural. Section 704 of the Administrative Procedures Act provides that "a preliminary, procedural or intermediate agency action not directly reviewable is subject to review on the review of the final agency action".

A litigant may conduct discovery beyond the "administrative record" to determine

whether the record is complete on demonstrating some reasonable basis for believing the records incomplete. No showin of bad faith, as reflected in the opinion of the Ninth Circuit is required. Texas Steel Co. v. Donovan, 93 F.R.D. 619, 621 (N.D. Tex 1982); Tennaco Oil Co. v. Dept. of Energy, 4 F. Supp. 299, 317 (D. Del. 1979). In Citize to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) this court noted that the "thorough", "probing" and "in depth" review the agency decision is to be based on the "whole record" compiled by the agency; the basis of review as required under Section 70 of the Administrative Procedure Act. Id. 41 419.

Absent a complete administrative record which includes all the documents compiled an considered by the agency, reviewing courts a unable to conduct a thorough, in depth, probing review "of agency action". Such a review is thwarted if the court receives onl

select documents which the agency chooses to include in the record.

The "whole" administrative record in a case requiring judicial review of agency action comprises all documents and materials directly or indirectly considered by the agency decision makers. Thompson v. U.S. Dept. of Labor, 885 F.2d 551 (9th Cir.) 1989. The Tribe, in its papers to the Ninth Circuit presented correspondence from the Forest Service indicating that records consisting of **an estimated 14,400 pages of material regarding the Canyon Uranium Mine were contained in the Forest Service files.**[20] This estimate is almost three times

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[20] By letter to Tribal counsel dated November 29, 1988, the Forest Supervisor stated:

> I do wish to note that processing your request will be a formidable task. The Canyon Uranium Mine records are voluminous. In this office alone, they comprise nearly four full file drawers. Based on a conversion factor of 200 pages per inch for the six feet of

(Cont.)

the "administrative record" produced by the Forest Service in District Court which ran approximately 5,000 pages in length.

It is clear that the so called "administrative record" filed below does not contain all documents directly or indirectly compiled or considered by all levels of the Forest Service in rendering its decision to approve the Canyon Uranium Mine.

This court can illuminate its previous rulings regarding the nature of the administrative record required to be compiled by administrative agencies and produced as part of a judicial review of administrative agency action.

Having determined that the Tribe had no access to the Canyon Uranium Mine provided

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material on hand, we estimate that the supervisor's office file contains approximately 14,400 pages. Another full file drawer of Canyon Mine records are located in the office of the Tusayan Ranger District.

under the Grand Canyon Enlargement Act, the District Court further determined that no fiduciary duty toward the Havasupai Tribe was created thereby and dismissed this breach of fiduciary duty claim.

CONCLUSION

The Ninth Circuit has thus interpreted a federal statute of major importance in a manner inconsistent with the prior rules of construction established by this court. Plenary consideration of the matter by this Court is essential.

For these various reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVASUPAI TRIBE, a federally recognized Indian Tribe; DELMER UQUALLA; ISSA UQUALLA; CLARK JACK, JR.,; REX TILOUSI; WAYNE SINYELLA, Plaintiffs-Appellants, v. F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; SOTERO MUNIZ, in his official capacity as Regional Forester, Southwestern Region, United States Forest Service; LEONARD LINDQUIST, in his official capacity as Forest Supervisor, Kaibab National Forest, Southwestern Region, United States Forest Service; ENERGY FUELS NUCLEAR, INC., a Colorado Corporation; ENERGY FUELS EXPLORATION COMPANY, a Colorado Corporation; UNITED STATES OF AMERICA, the United States Department of Agriculture, Forest Service; RICHARD LYNG, in his official capacity as Secretary of Agriculture, Defendants-Appellees.	No. 90-15956 D.C. No. CV-88-0971-RGS (District of Arizona) ORDER

Before: HUG, SCHROEDER, and WIGGINS, Circuit Judges.

The appellants' petition for rehearing i denied.

HAV-104417

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVASUPAI TRIBE, a federally recognized Indian Tribe; DELMER UQUALLA; ISSA UQUALLA; CLARK JACK, JR.,; REX TILOUSI; WAYNE SINYELLA,	)	
Plaintiffs-Appellants,	)	
v.	)	
F. DALE ROBERTSON, in his official capacity as Chief, United States Forest Service; SOTERO MUNIZ, in his official capacity as Regional Forester, Southwestern Region, United States Forest Service; LEONARD LINDQUIST, in his official capacity as Forest Supervisor, Kaibab National Forest, Southwestern Region, United States Forest Service; ENERGY FUELS NUCLEAR, INC., a Colorado Corporation; ENERGY FUELS EXPLORATION COMPANY, a Colorado Corporation; UNITED STATES OF AMERICA, the United States Department of Agriculture, Forest Service; RICHARD LYNG, in his official capacity as Secretary of Agriculture,	)	No. 90-15956 D.C. No. CV-88-0971-RGS OPINION
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Arizona
Roger G. Strand, District Judge, Presiding

Argued and Submitted
June 11, 1991 - San Francisco, California

Filed August 26, 1991

Before: Procter Hug, Jr., Mary M. Schroeder and Charles Wiggins, Circuit Judges.

Per Curiam

SUMMARY

Administrative Law

Affirming a district court judgment upholding the Forest Service's approval of development of a uranium mine, the court of appeals held that the district court did not err in limiting its review to the administrative record complied by the Forest Service in considering the Havasupai Tribe's NEPA claims.

Appellant, the Havasupai Tribe, challenged a decision by the Forest Service approving development of a uranium mine in the area of the Grand Canyon, arguing that the

land involved is an area of religious significance to them, and that the Forest Service did not adequately consider the effect of such a mine on their water supply. The Tribe argued the district court erred by barring discovery and limiting review to the administrative record filed by the Forest Service; the Plan interfered with the Tribe's aboriginal right of access to the mine site, and the EIS prepared by the Forest Service violated the National Environmental Policy Act (NEPA).

[1] Because the Tribe pointed to nothing in support of its contention that the Forest Service acted in bad faith or relied on materials outside the administrative record, the district court did not err by barring discovery. Although the Tribe was correct that discovery beyond the administrative record is permitted where it is clear that the agency considered documents outside of that record in reaching its conclusion, the Tribe's claim that the agency considered such evidence

in this case was purely speculative. [2] Concerning the Tribe's claim that there was inadequate consideration by the government of the effects of the mining of groundwater that supplies the Tribe's water, the Service's decision not to supplement the EIS in light of the information brought forth by the Tribe was not unreasonable. The Tribe was basing its arguments upon disagreements among experts. Such disagreements do not invalidate an EIS. The district court review fulfilled its role in reviewing an EIS.

[3] If the Grand Canyon National Park Enlargement Act were the legislative action through which the Havasupais' aboriginal title to the area was extinguished, the Tribe's claim of a right of access to the mine would have significant merit. However, that was not the case. In 1969, Congress had compensated the Tribe for the taking of this land in 1880. Once Congress compensated the Tribe, aboriginal title was extinguished.

COUNSEL

Joe P. Sparks and Michael Shiel, Scottsdale, Arizona, for the plaintiffs-appellants.

Lawrence E. Stevens, Parson, Behle & Latimer, Salt Lake City, Utah, for the defendant-appellee Energy Fuels.

Jacques B. Gelin, Department of Justice, Washington, D.C., for the defendant-appellee United States Government.

OPINION

PER CURIAM:

The Havasupai Tribe appeals the district court's affirmance of the decision of the Forest Service, which approved the development of a uranium mine in the area of the Grand Canyon. The Tribe has opposed the development, arguing that the plot of land involved is an area of religious significance to them, and that the Forest Service did not adequately consider the effect of such a mine on their water supply.

In this appeal the Tribe contents that (1) the district court erred by barring discovery and limiting review to the administrative record filed by the Forest Service, (2) the Plan interfered with the Tribe's aboriginal right of access of the mine site, and (3) the Environmental Impact Statement (EIS) prepared by the Forest Service violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA).

The district court considered the appellants' challenges in a lengthy and carefully reasoned opinion. Havasupai Tribe v. United States, 752 F.Supp. 1471 (D. Ariz. 1990). We agree with the district court's reasoning, and indeed the appellant itself commendably does not quarrel with most of it. We therefore affirm.

[1] Appellants argue strenuously that the district court should not have limited it review to the administrative record complied by the Forest Service in considering the

appellants' NEPA claims. The Tribe is correct in its argument that discovery beyond the administrative record is permitted where it is clear that the agency considered documents outside of that record in reaching its conclusion. The Tribe's claim that the agency considered such evidence in this case, however, is purely speculative. Because the Tribe has pointed to nothing in support of its contention that the Chief of the Forest Service acted in bad faith or relied on materials outside the administrative record, the district court did not err by barring discovery. See Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988) modified, 867 F.2d 1244 (9th Cir. 1989).

The Tribe's most troubling claim is that there was inadequate consideration by the government of the effects of the mining on groundwater which supplies the Tribe's water. In support of this claim, however, the Tribe relies upon the contentions of Dr. David

Kramer, which were made in a letter drafted after the final EIS issued. The Tribe had some obligation to raise these issues during the comment process. Its views were solicited. Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978).

[2] Nevertheless, the district court addressed this claim and determined that the Forest Service had adequately considered the issues that the Tribe was raising. The Service's decision not to supplement the EIS in light of the information brought forth by the Tribe was not unreasonable. The district court concluded that the Tribe was "basing [its] arguments upon disagreements among experts." 752 F. Supp. at 1502. It then correctly noted that "disagreement among experts does not invalidate an EIS." Id. See Cady v. Morton, 527 F.2d 786, 796 (9th Cir.

1975). Contrary to the Tribe's contention, the district court was not required to undertake a de novo review of the Forest Service's plan. See 5 U.S.C. § 706 (court reviews agency action for arbitrariness or abuse of discretion). What the district court did fulfilled its role in reviewing an EIS.

The Tribe also claims a right of access, essentially amounting to an easement, to the area that includes the mine site. This claim is based on an argument that until the 1970's, when the Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228i ("GCEA"), was passed, the Tribe retained aboriginal title to that land. The GCEA includes a provision that states that it is not to be construed as depriving the Tribe of access to its religious sites. Since the GCEA is what extinguished aboriginal title, the Tribe claims, this provision works as a condition upon the Tribe's relinquishment, and pursuant to it the Tribe retained part of the "bundle

of rights" -- namely, an easement to any reli
gious site included within the land it gave up.

[3] If the GCEA were the legislative action through which the Havasupais' aboriginal title to the area was extingusihed, the Tribe's argument on that issue would have significant merit. Such, however, is not the case. In 1969, the Indian Claims Commission ordered Congress to pay, and Congress did pay compensation to the Havasupai for this land, based on the Commission's finding that Congress had taken the land in 1880. This finding, in turn, was made after a hearing in which the Havasupai presented evidence that such a taking had occurred at that time. Onc Congress compensated the Tribe, aboriginal title was extinguished. See United States v. Gemmill, 535 F.2d 1145, 1148-49 (9th Cir. 9), cert. denied sub nom. Wilson v. United States 429 U.S. 982 (1976).

For these and the reasons stated by the district court, the judgment is AFFIRMED.

HAV-104419

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

THE HAVASUPAI TRIBE, et. al.,	)	
Plaintiffs,	)	
v.	)	CIV 88-971 PHX-RGS
UNITED STATES OF AMERICA, the United States Department of Agriculture, Forest Service, et. al.,	)	**O R D E R**
Defendants.	)	

I. **INTRODUCTION.**

Plaintiffs, the Havasupai Tribe and individual members of the Tribe, seek judicial review of the final decision by the Chief of the Forest Service to approve a modified Plan of Operations (the "Plan") submitted by co-defendant Energy Fuels Nuclear, Inc. in October 1984 for the Canyon Uranium Mine located in the Kaibab National Forest near the Grand Canyon National Park. Defendants in this action are: The united States of America, the Department of Agriculture, Forest

Service; the Secretary of Agriculture; Chief of the Forest Service; the Regional Forester of the Southwest Region; the Forest Supervisor of the Kaibab National Forest (collectively referred to as the "federal defendants"); Energy Fuels Nuclear, Inc. ("EFN") and Energy Fuels Exploration Company, a corporation (collectively referred to as "Energy Fuel"). Plaintiffs challenge the Forest Service's decision approving the Plan on four grounds. First, plaintiffs allege that the approval of the Plan by the Forest Service violates plaintiffs' first amendment rights to freely exercise their religion at the Canyon Mine site. Second, plaintiffs assert that the actions of both the Forest Service and EFN violate the plaintiffs' aboriginal right of access to the Canyon Mine site. Third, plaintiffs argue that the Forest Service breached its fiduciary duties owed to the plaintiffs by failing to preserve plaintiffs' alleged right of access to the Canyon Mine

site. Fourth, plaintiffs allege that the Environmental Impact Statement ("EIS") is deficient and fails to comply with the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq. ("NEPA"). Plaintiffs seek declaratory and permanent injunctive relief under the first three claims, and on their fourth claim, request that the court declare the EIS inadequate and other the Forest Service to prepare an EIS in compliance with NEPA.[1]

The matter before the court has been extensively briefed and argued by the parties.[2] Having considered the

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[1] By Order dated July 29, 1988, the court determined that review in this case would be limited to the administrative record. The federal defendants have filed 14 volumes comprising the administrative record. By Order dated September 8, 1988, the court denied plaintiffs' motion to produce, motion to take discovery, and motion to strike. The court granted plaintiffs' motion to establish a uniform system of citation to the record. Citations to the administrative record are to Volume - Document - Page (V.__-D.__-P.__).

[2] The arguments were based upon the (Cont.)

administrative record, the memoranda of the parties and their positions at oral argument, the file in this matter, and the pertinent legal authority, the court now renders its decision.

II. **BACKGROUND.**

In October 1984, Energy Fuels Nuclear, Inc. submitted to the United State Forest Service, Kaibab National Forest, a Plan of Operations for Canyon Mine site, pursuant to Forest Service regulations, 36 C.F.R. § 228, Subpart A. EFN's Plan proposed the development of a uranium mine on an unpatented mining claim located on the Tusayan Ranger District of the Kaibab National Forest in Coconino County, Arizona.

The Canyon Mine site is located on land which was part of the original Grand Canyon

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administrative record and the court took judicial notice of legislative history and various documents as they related to the legal arguments made by the parties.

Forest Reserve established in 1893 pursuant to the Forest Reservation Act of 1891. In 1908, the area was incorporated into the Coconino National Forest. Between 1908 and 1934, the area in dispute undersent numerous administrative name changes, however, the area officially became part of the Kaibab National Forest, in 1934. The Canyon Mine site is approximately thirty-five miles southeast and upstream from the Havasupai Reservation.

The Canyon Mine involves the underground mining of breccia pipe uranium deposits. The Canyon Mine site will require disturbance of approximately seventeen acres for the mine shaft and surface facilities. EFN has conducted exploratory drilling on the site during the period between 1978-1985 (excluding 1979). See generally, V.4B-D.215-P.4664; Id. at P.4652 (affidavits setting out history of development at the Canyon Mine site).

The Havasupai are a federally recognized Indian Tribe who have made their home in and

around the Grand Canyon located in Northern Arizona since before the first contact with Europeans.[3] It is undisputed that plaintiffs' aboriginal lands once encompassed the Canyon Mine site. Plaintiffs contend that the location proposed for the Canyon Mine is a sacred and religious place for the members of the Havasupai Tribe. Plaintiffs believe that complete development of the Canyon Mine will deny plaintiffs' access to their sacred site and destroy the very essence of their religious and cultural system. E.g., V.2B-D.59-P.1827 (Transcript of Oral Presentation before the Deputy Regional Forester, May 14, 1987); V.3B-D.122-P.3137-3143 (Affidavit of Four Havasupai Tribe members); V.3D-D.176-P.3716-3825 (Transcript of Oral Presentation before the Chief of the Forest Service, February 25, 1987).

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[3] For a detailed discussion on the history of the Havasupai Tribe, see S. Hirst, Havasua Baaja: People of the Green Blue Water (1985).

Following submission of the Plan by EFN, the Forest Service distributed more than 100 copies of the Plan to interested parties. The Forest Service received over 200 letters in response to requests for written comment. Analysis of these comments and input from several public meetings made it clear there was substantial public concern and controversy about the proposal and its potential effects on the quality of the human environment. Consequently, the Forest Service, pursuant to NEPA, decided to prepare an EIS. The notice of the decision to prepare an EIS, which formally begins the scoping process, was published in the Federal Register on April 30, 1985. 50 Fed. Reg. 18281. Following the decision to prepare an EIS, the Forest Service distributed more than 2,000 scoping letters to federal, state, and local government agencies, Indian tribes, news media and other interested individuals in preparation for a public scoping session to be held in Flagstaff,

Arizona on May 15, 1985. As a result of the scoping process, the Forest Service identified the principal areas of concern to be addressed in the EIS.

The Forest Service prepared a draft EIS considering various alternatives and released it to the public for comment on February 28, 1986. The deadline for public comment was May 1, 1986. The Forest Service released a final EIS, which was revised to reflect the comments received on the draft EIS, on September 29, 1986. On September 26, 1986, Forest Supervisor, Leonard Lindquist, issued his Record of Decision documenting the approval of the modified Plan of Operations.

On November 10, 1986 following the issuance of the Record of Decision approving the modified Plan of Operations, plaintiffs and others filed a timely appeal from the Forest Supervisor's decision with the Regional Forester, pursuant to 36 C.F.R. § 211.18. Appellants also sought a stay of site

preparation and drilling pending the appeal. On November 21, 1986, the Regional Forester, Sotero Muniz, stayed the drilling of the uranium mine pending appeal, but authorized commencement of the mine site preparation activities.

On February 17, 1987, the Forest Supervisor filed his responsive statement with the Regional Forester and the public. On August 28, 1987, the Regional Forester affirmed the Forest Supervisor's decision on the merits. On September 25, 1987, plaintiffs and others appealed from the Regional Forester's decision to the Chief of the Forest Service, pursuant to 36 C.F.R. § 211.18, and again sought a stay of drilling at the site. On October 22, 1987, the Chief of the Forest Service continued the stay that had been issued by the Regional Forester. On June 9, 1988, the Chief of the Forest Service issued his decision affirming the Regional Forester's decision of August 28, 1987. The Secretary o

Agriculture decided neither to review the procedural appeal nor the appeal on the merits so the Cheif's decisions became the agency's final determination.

Plaintiffs brought the instant suit seeking review of the agency's final decision. Following a hearing on the plaintiffs' application for preliminary injunction on June 17, 1988, the parties stipulated and the court ordered that the stay entered by the Forest Service would remain in effect until the court rules on the merits of the controversy and thereafter until time for appeal has expired.

III. **EXTINGUISHMENT OF ABORIGINAL TITLE**

Plaintiffs claim that they have a prior and superior right of access to their sacred site at the Canyon Mine site based on their aboriginal title which plaintiffs argue was preserved by the Grand Canyon National Park-Enlargement Act, 16 U.S.C. § 228i (hereinafter the "GCEA"). Defendants assert that

plaintiffs' reliance on the GCEA is misplaced and that there is no doubt that by the time the GCEA became law in January 1975, all interest of the Havasupai Tribe in any of the non-trust lands comprising the Kaibab National Forest, including the Canyon Mine site had been extinguished.

It is undisputed that plaintiffs' aboriginal title once encompassed the area of the Canyon Mine site.[4] Aboriginal title is a term of art used to describe an Indian possessory interest in land which Indians have inhabited since time immemorial. County of Oneida v. Oneida Indian Nation, 470 U.S. 226,

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[4] The Indian Claims Commission in 1968 determined that the aboriginal territory of the Havasupai had extended from the present boundary of the Hualapai Reservation on the west, the Bill Williams River on the eat and to the Colorado River on the north. Red Butte, just south of the Canyon Mine site, is located approximately in the center of the Havasupai Tribe's former aboriginal territory. The Havasupai Tribe, et. al., v. United States, 20 Ind. Cl. Comm. 210, 234 (1968) (Finding of Fact No. 11).

234 (1985) (citing Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947)). The Supreme Court has consistently recognized the aboriginal rights of the Indians to their lands. The Indians right of occupancy is "'as sacred as the fee simple of the whites.'" Id. at 235 (quoting Mitchel v. United States, 9 Pet. 711, 746 (1835)).

Aboriginal title is a permissive right of occupancy granted by the federal government. United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir.), cert. denied, 429 U.S. 982 (1976) (citing Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (Marshall, C.J.)). Aboriginal title may be extinguished by the federal government at any time, although an "extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." Id. at 1147 (quoting United States v. Santa Fe P. R.R. Co., 314 U.S. 339, 354 (1941)). Congress' power to extinguish

aboriginal possession is supreme, "whether i
be done by treaty, by the sword, by purchase
by the exercise of complete dominion adverse
to the right of occupancy, or otherwise . .
. ." United States v. Santa Fe Pacific R.R
Co., 314 U.S. at 347, 62 S. Ct. at 252
(citations omitted). Therefore, the issue i
whether the Havasupai aboriginal title to th
land, including the Canyon Mine site, has be
extinguished.

The treatment of the land is instructiv
to the issue of extinguishment. The origina
Havasupai reservation had been created by
executive order in 1880. In 1882, the
Havasupai reservation was diminished in size
by executive order to an area of about 518
acres. The creation of an Indian Reservatio
however, does not invariably extinguish
aboriginal title to outlying areas. United
States v. Santa Fe P. R.R., 314 U.S. 339, 35
56 (1941); Gila River-Pima-Maricopa Communit
v. United States, 494 F.2d 1386, 1389, cert.

denied, 419 U.S. 1021 (1974). An action of extinguishment by executive action depends on the acquiescence of Congress for its efficacy. United States v. Southern Pac. Transp. Co., 543 F.2d 676, 689 (1976).

The Canyon Mine site is located on ground that was part of the original Grand Canyon Forest Reserve established by presidential proclamation in 1893 pursuant to the Forest Reservation Act of 1891. In 1908, the area was incorporated into the National Forest System as part of the Coconino National Forest. The area officially became part of the Kaibab National Forest in 1934. Several courts have determined that the reservation of lands for forest purposes effectively extinguishes Indian title. United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1386, 1391-02 (Ct. Cl.), cert. denied, 456 U.S. 1006 (1975); Gemmill, 535 F.2d at 1149.

In Gemmill, the Ninth Circuit determined that "any ambiguity about extinguishment that

may have remained after the establishment of the forest reserves, has been decisively resolved by Congressional payment of compensation to the . . . Indians for these lands." Id. at 1149. In the instant case, the final judgment entered by the Indians Claims Commission and payment of the judgment by Congress resolves any doubt that aboriginal title of the Havasupai Tribe was extinguished. In the Havasupai's petition to the Indian Claims Commission, the Havasupai asserted that the action of the United States barring the "... Tribe from its original territory after November 21, 1871, in establishing a Havasupai Reservation and in excluding the . . . Tribe from that portion of the Havasupai country outside the said Reservation therefore constituted a wrongful taking of all rights, title and interest in the said land belonging to the . . .Tribe." The Havasupai Tribe v. United States, Docket No. 91 (Jan. 22, 1951); Hearing exhibit #13 at

¶ 41. The Commission did not have the power to extinguish aboriginal title, but was a mechanism set up by Congress to make determinations of whether title had, in fact, been extinguished. The Commission determined that "by establishing a reservation for the [Havasupai] on June 8, 1880 and March 3, 1882, the United States wrongfully took [Havasupai] aboriginal title lands without payment of compensation therefor . . . ." The Havasupai Tribe v. United States, 20 Ind Cl. Comm. 210, 220 (1968); Hearing exhibit #15. The determinations of the Commission in establishing the taking date should be given great weight if reasonable. Pueblo of San Ildefonso, 513 F.2d at 1391. In Gemmill, the Ninth Circuit recognized the difficulty of establishing the exact date on which Indian title has been extinguished. 535 F.2d at 1149. The Ninth Circuit's conclusion, which is equally applicable to the instant case where counsel went through the various actions

in detail, is that "[a]ny one of these actions examined in isolation, may not provide an unequivocal answer to the question of extinguishment." Id. However, the actions by the federal government which culminated in the payment of the compromise settlement agreement show that the aboriginal title of the Havasupai has been extinguished. See Id. Because of the payment of the compromise settlement by Congress, the court need not set an exact date for extinguishment of the Havasupai Tribe aboriginal title. The court simply recognizes that prior to the enactment of the GCEA, the Havasupai had no aboriginal title in the lands encompassing the Canyon Mine site.

Plaintiffs rely on the Examiners' Report on Tribal Claims to Released Railroad Lands in Northwestern Arizona (May 24, 1942); Hearing exhibit #4; for their proposition that Havasupai aboriginal title and the right of use had not been extinguished prior to

enactment of the GCEA. The purpose of the examination was to determine whether and to what extent any of the lands released to the Santa Fe Pacific Railroad Company were subject to outstanding occupancy or other rights. It is undisputed that the land under scrutiny in the Examiners' Report did not concern the land which now comprises the Canyon Mine site. Plaintiffs contend that the analysis of their aboriginal title is applicable to the instant case. The examiners were of the opinion that no such extinguishment of aboriginal title had occurred. Id. at 49. The Examiners' Report, however, predates the Indians Claim Commission created by Congress in 1946, the final judgment entered by the Commission in 1969, and the Gemmill decision and United States v. Dann, 873 F.2d 1189, 1194 (9th Cir. 1989). In light of the foregoing extinguishment analysis, the court finds that the . . . Examiners' conclusions are not applicable to the instant litigation.

Most recently, the Ninth Circuit reaffirmed these principles in United States v. Dann, 873 F.2d 1189 (9th Cir. 1989). There, the Ninth Circuit stated where a claim has been paid pursuant to a determination by the Indian Claims Commission, "we cannot avoid the rule of Gemmill that payment for the taking of an aboriginal title establishes that title has been extinguished." Id. at 1194.

The Supreme Court left open the issue of individual aboriginal title. Id. at 1193 (citing United States v. Dann, 470 U.S. 39, 50 (1985). At oral argument, plaintiffs contended that they could establish individual aboriginal title based upon Dann and Cramer v. United States, 261 U.S. 219 (1923), but the court declined to permit the presentation of evidence on this issue. The Administrative Record indicates that the plaintiffs' claims have been based on their status as Havasupai Indians. The Record fails to reflect any claim of individual aboriginal rights to the

Canyon Mine site. The plaintiffs raised the issue after the issuance of Dann on January 11, 1989. The discussion in Dann, however, is instructive on this issue. The Ninth Circuit noted that no individual claim had been made. 873 F.2d at 1196. However, the court of appeals noted that no remnants of tribal title can survive thereafter in individual tribal members. Id. This court agrees. The court of appeals then focused on a narrower view of individual aboriginal title as discussed in Cramer. Id. at 1197. In Cramer, three Indians had occupied 175 acres of public land for years prior to the United States grant of a patent to a railroad. 261 U.S. 219. The Supreme Court upheld their title to the land actually enclosed and occupied by the individual Indians. Id. at 234-36. The Ninth Circuit's analysis of Cramer reveals that the decision was based upon a federal policy at the time to favor "land settlement in general and Indian occupancy in particular." 873 F.2d

at 1197. The Ninth Circuit noted that the policy of public lands settlement underlying Cramer no longer exist. Id. at 1198. An Indian cannot gain a right of occupancy simply by occupying public lands. Id. Even accepting the religious significance and use of the site by the individual Indians (as set forth in the Record and the Offer of Proof), the court finds that this does not amount to actual possession of the Canyon Mine site to the exclusion of all other. See Id. at 1199.

Plaintiffs contend that 25 U.S.C. § 194 is applicable in this matter and that defendants has failed to carry their burdens of production and persuasion. The court finds and concludes that this statute is inapplicable since aboriginal title had been extinguished. Furthermore, the term "white person" does not include the United States. See Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (Section 194 does not apply against a sovereign state). Alternatively, the

defendants have carried any burden that section 194 imposes through their extinguishment arguments.

Accordingly, the court finds and concludes that plaintiffs' aboriginal title to the lands encompassing the Canyon Mine site was . . . extinguished prior to the enactment of the Grand Canyon National Park-Enlargement Act of 1975.

IV. LEGAL BARRIERS TO PLAINTIFFS' CLAIMS

Defendants also contend that plaintiffs are barred by statute and by principles of res judicata and collateral estoppel from asserting the present claims of right of access. Congress created the Indian Claims Commission to hear and determine all Indian claims against the federal government accruing as of the date of the Act. The Indian Claims Commission Act of 1946, 25 U.S.C. § 70 et. seq. (terminated on Sept. 30, 1978). The purpose of the Act was to provide a forum in which Indian Tribes could present "all their

claims of every type and variety" against the federal government. Congress vested the ICC with jurisdiction "[b]road enough to include all possible claims." White Mountain Apache Tribe v. Clark, 604 F. Supp. 185, 187 (D. Ariz. 1984), aff'd, 784 F2d 921 (9th Cir.), cert. denied, 479 U.S. 1006 (1986) (quoting Act of August 13, 1946, Pub.L. No. 726, 1946 U.S. Code Cong. Serv. (60 Stat.) 1347, 1355).[5] Based upon the grant of jurisdiction

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[5] The language of the 25 U.S.C. § 70a, in part, illustrates the breadth of the jurisdiction:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe, band or other identifiable group of American Indians residing with the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue

(Cont.)

of the Act as well as its legislative history, all claims arising prior to 1946 were to have been brought before the Indian Claims Commission or were forever barred. Id. at 187 (citing 60 Stat. 1049, 1052); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1464-66 (10th Cir. 1987); Temoak Band of Western

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in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as a result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Shoshone Indians v. United States, 593 F.2d 994, 998 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979).

In White Mountain Apache Tribe, the Indian tribe brought suit alleging that an 1887 survey erroneously excluded certain acreage from their reservation. The Tribe petitioned the ICC for redress for alleged wrongs committed by the United States; namely loss of property. The ICC determined that title outside of the reservation was extinguished. A stipulated settlement in the amount of $4.9 million dollars was reached between the Indian tribe and the United States. The court determined that under the principles of res judicata, the Indians' present claim was either settled or foreclosed by the earlier proceedings initiated by the ICC. 604 F.Supp. at 187-89.

Similarly, the Havasupai petitioned the Indian Claims Commission alleging that the United States had wrongfully deprived the

Havasupai of their aboriginal lands. See The Havasupai Tribe v. United States, 20 Ind. Cl. Comm. 210 (1968); Hearing exhibits #13 and #15. The Indian Claims Commission concluded that the Havasupai did not voluntarily abandon any of their aboriginal lands. Id. at 220; Hearing exhibit #15. Further, the ICC determined that the United States wrongfully took the Havasupai aboriginal title without payment of compensation when the government established a reservation for the Havasupai by the Executive Orders of June 8, 1880 and March 3, 1882. Id. at 220, 234-35. The Indian Claims Commission entered final judgment, incorporating a stipulated agreement between the Havasupai and the United States, awarding the Havasupai the sum of $1,240,000. The Havasupai Tribe v. United States, 21 Ind. Cl. Comm. 324, 341 (1969); Hearing exhibit #16. The United States made payment of the awarded compensation to plaintiffs within the meaning of the Indians

Claim Commission Act, 24 ?U.S.C. § 70u(a). See Act of December 26, 1969, Publ. L. 91-166, ch. 9, 83 Stat. 447; Act of September 29, 1972, Publ. L. 92-438, 86 Stat. 741. Payment occurred for purposes of this litigation when Congress authorized and appropriated said payment. Whether the Indians accept payment is not determinative. United States v. Dann, 470 U.S. 39, 44 (1984).

Section 70u(a) of the Indian Claims Commission Act is a statutory bar which provides that "The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." In this case, the court finds and concludes that the plaintiffs' current right to access claim "touches" a matter involved in the prior case before the Indian Claims Commission because the Canyon Mine site is within the area of land that was in

controversy during those proceedings involving the Havasupai.

Plaintiffs assert that the ICC did not provide a forum for the plaintiffs to bring the present action against private parties such as Energy Fuels for allegedly wrongful future actions. This approach fails to recognize that by the time of the ICC's determination plaintiffs' aboriginal title has been extinguished. Thus, plaintiffs cannot avoid the statutory bar, as well as the principle of res judicata. The plaintiffs' claim may also be barred under the principles of collateral estoppel. See Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407, 1413 (8th Cir. 1983) (ICC decision bars Oglala Sioux Tribe from relitigating whether previous Congressional act extinguished rights in their former aboriginal territory).

The Havasupai also expressly stipulated that the Tribe would be barred from asserting any claim with respect to their aboriginal

land, including claims which they could have but did not assert.

> "Entry of final judgment in said amount shall finally dispose of all rights, claims or demands which the petitioner has asserted or could have asserted with respect to subject matter of Docket No. 91, and petitioner shall be barred thereby from asserting any such right, claim or demand against defendant in any future action." 21 Ind. C. Comm. at 337.

Plaintiffs point to another provision in the stipulation which states that:

> "The final judgment entered pursuant to this stipulation shall be by way of compromise and settlement and shall not be construed as an admission by either party, for the purposes of precedent or argument, in any other case." Id. at 337.

Plaintiffs contend that the stipulation as well as any reference to the ICC opinions cannot be used as they are not part of the Administrative Record. The court agrees that the stipulation cannot be used as a factual admission by the plaintiffs in this matter.

The ICC proceedings, however, are an appropriate subject for judicial notice and are material to this case as they pertain to the defendants' legal arguments concerning extinguishment (i.e., claim was made and claim was paid concerning plaintiffs' aboriginal territory). See Gemmill, 535 F.2d at 1149; Dann, 873 F.2d at 1194.

Accordingly, the court finds and concludes that plaintiffs' present action, based on its assertion of aboriginal title, is statutorily barred by 25 U.S.C. §70u and barred by the principles of res judicata due to the final judgment and payment of the compensation in the proceeding before the Indian Claims Commission.

V. INTERPRETATION OF THE GRAND CANYON ENLARGEMENT ACT

Plaintiffs' position is that the first and only act of Congress extinguishing Havasupai aboriginal title was the Grand Canyon National Park Enlargement Act of 1975,

16 U.S.C. § 228i. Plaintiffs assert that the GCEA extinguished all of the rights of the Havasupai in their aboriginal title except one. Plaintiffs analysis relies heavily, in the first instance, on the supposition that aboriginal title had not been extinguished prior to the enactment of the GCEA. The court, however, has determined that the plaintiffs' aboriginal title was extinguished prior to the GCEA. See supra Sec. III.

Plaintiffs argue that section 228(i) specifically preserves a right of access to sacred religious places such as the Canyon Mine site. The court disagrees. Section 228(i) provides, in part, that:

> Nothing in Section 228a-228j of this title shall be construed to prohibit access by any members of the Tribe to any sacred or religious places or burial grounds, native foods, paints, materials and medicines located on public lands not otherwise covered in Section 228a to 228j of this title.

The court has reviewed the Grand Canyon

Enlargement Act and its legislative history. First, the legislative history reveals that the Havasupai Tribe sought enlargement of their reservation to include lands that did not include the lands encompassing the Canyon Mine site. See Hearing Exhibits #17-18. Second, the legislative history reveals that Congress did discuss and debate the issue of extinguishment of the Havasupai aboriginal title in light of the Indians Claims Commission determination. Third, whether or not aboriginal title of the Havasupai had previously been extinguished was not a necessary finding with respect to the action taken by Congress in passing the GCEA. Fourth, Congress could and did enlarge the Havasupai reservation. Fifth, the language upon which plaintiffs rely does not create an affirmative right of access.

The main focus of the GCEA was to increase the size of the Grand Canyon National Park and secure its beauty and splendor for

generations to come. See 16 U.S.C. § 228a-228j; 120 Cong. Rec. H10436-10437 (Oct. 11, 1974). Within the context, the problem of th Havasupai Tribe came to the forefront. E.g., 120 Cong. Rec. S8523-8524 (May 20, 1974) (statement of Sen. Goldwater); 120 Cong. Rec. S11443 (June 25, 1974) (statement of Sen. Humphrey). The legislative history reveals that much debate was had on whether or not to increase the size of the Havasupai reservatio to include approximately 251,000 acres desire by the Tribe, which represented the lands tha they were then using for grazing as allowed under section 3 of the Act of February 26, 1919. E.g., 120 Cong. Rec. H10435-10450 (Oct 11, 1974).

The legislative history reflects that Congress did debate whether or not the Havasupai's aboriginal title had been extinguished by the 1969 settlement before th ICC. See 120 Cong. Rec. H6683-6684 (July 17, 1974) (statement of Rep. Udall). However,

such a determination was not necessary, as Congress had the power to enlarge the reservation: "Whether or not title was extinguished when the reservation was created, there is no doubt that the Congress can . . enlarge any Indian reservation, if it chooses to do so, by setting aside lands belonging to the United States in trust for the use of the tribe." House Committee on Interior and Insular Affairs, Report with Dissenting and Additional Views on S.1296, Report No. 93-1374, at 9 (Sept. 25, 1974); see also, 120 Cong. Rec. H10444 (statement of Rep. Foley); ("Congress has the responsibility and the power to create, add to or abolish Indian reservations as it sees fit. . . . The question here is one of need, and the committee concluded that the tribe indeed needs a larger land base.") Id. at 10440 (statement of Rep. Udall). The legislative history reflects a concern on behalf of some members of Congress that expansion of the

Havasupai Reservation would undermine the entire process under the Indian Claims Commission . 120 Cong. Rec. H10449-10450 (statement of Rep. Dellenback); Id. at H10450 (statement of Rep. Taylor). The legislative history reflects the fact that the ICC paid the compensation for the Tribe's aboriginal lands but allowed them to use the area they now sought for an enlarged reservation for grazing purposes. House Committee on Interio and Insular Affairs, Report with Dissenting and Additional Views on S.1296, Report No. 93 1374, at 9. The situation of the Havasupai appeared to be unique to other claims settled by the ICC and would not create a dangerous precedent to claims by other Indian Tribes. See Id. at 10; 120 Cong. Rec. H10440 (statement of Rep. Udall); 120 Cong. Rec. H6684 (July 17, 1974).

Congress declared that an additional 185,000 acres were to be held in trust enlarging the reservation of the Havasupai

Tribe. 16 U.S.C. § 228i(a). Congress, however, did place various restrictions on the Havasupais' use of the land consistent with the Congressional intent to preserve the splendor of the Grand Canyon. See Id. at § 228i(b). Congress also designated 95,300 acres as Havasupai use lands for grazing and other traditional purposes. Id. at § 228i(e). In reference to the use area, the legislative history recognizes that "this area contains places of historic significance to the tribe, as well as burial grounds and religious shrines, the Committee agreed that access within the area should be guaranteed for tribal members." House Committee on Interior and Insular Affairs, Reports with Dissenting and Additional Views on S.1296, Report No. 93-1374, at 10. It is undisputed that neither the enlarged reservation or designated use lands encompass the Canyon Mine site.

An examination of the language in section

228i(c), which plaintiffs rely upon, indicate that Congress did not create, p reserve, or confirm any affirmative right to access. The parties have not presented, and the court is unable to find, any legislative history concerning the relevant part of section 228i(c) which supports the plaintiffs' interpretation. Section 228i(c) clearly indicates that the Grand Canyon Enlargement Act shall not be construed to prohibit access. There is no part of the GCEA which prohibits plaintiffs' access to the Canyon Mine site. The language in section 228i(c) a statement of statutory neutrality to judges administrative agencies, and others not to interpret the GCEA to prohibit access on othe public lands. Such a statement of statutory neutrality is particularly appropriate in light of the past friction between the Havasupai and some agencies of the federal government. See e.g., 120 Cong. Rec. S7554, 7555 (statement of Sen. Kennedy); 120 Cong.

Rec. Extension of Remarks in the House (July 8, 1974) (editorial from the Los Angeles Times); 120 Cong. Rec. H6684 (July 17, 1974) (statement of Rep. Udall); 120 Cong. Rec. H10440 (Oct. 11, 1974) (statement of Rep. Udall); V.3D-D.172 (p. 166) - P.3633.

A review of other sections of the GCEA support the court's determination that section 228i(c) does not create an affirmative right of access. Congress knew how to create land in trust for the benefit of the Havasupai. Section 228i(a) provides that Lands "are hereby declared to be held by the United States in trust for the Havasupai Tribe." Congress also knew how to create a right of access. The sentence immediately preceding the disputed sentence in § 228i(c) states that" "the Secretary shall have the right of access to any lands hereby included in the Havasupai Reservation." No similar grant in trust or affirmative right of access is created by the language plaintiff cites.

Plaintiffs also analogize the language contained in the GCEA to extinguishment of title and preservation of rights in the Massachusetts and Connecticut Indian Land Claims Act, 25 U.S.C. § 1771; 25 U.S.C. § 1751. In those acts, however, Congress did not preserve aboriginal rights, but only personal claims of individual Indians. It is also interesting to note that in those acts the reservation occurred in the same clause as the extinguishment. In the GCEA, the language that plaintiffs assets support a grant of reservation does not appear in the same subsection of the GCEA that addresses extinguishment. This further supports an interpretation against creation of an affirmative right of access.

The language of § 228i(c) neither acknowledges or preserves an aboriginal right in any non-trust land or defines a trust responsibility on the part of the United States.

This interpretation is further supported by the fact that intense debate occurred at the time of the GCEA on whether to give the Havasupai Tribe any additional lands at all. In light of the debate on whether to give the Havasupai lands in trust at all, this court cannot infer that Congress intended to give the Havasupai a power that would amount to a veto over activities on public lands not otherwise covered by the act.[6] The area which plaintiffs claim a right to access covers over three million acres. There is no indication that Congress intended to prohibit such activities as mining throughout this area. See Pathfinder Mines Corp. v. Hodel, 811 F.2d

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6 The practical effects of accepting the Havasupais' interpretation of the GCEA would be immense and unpredictable. Plaintiffs shave thousands of other religious sites in their former aboriginal title land not otherwise covered by the GCEA, which the Havasupai will generally not reveal to non-Havasupai members. See V.3D-D.176-P.3766 (Comments of Tribal Chairman, Mr. Wayne Sinyella).

1288, 1291 (9th Cir. 1987).

Based upon the analysis in Sections III, IV and V of this Order, the court finds and concludes that plaintiffs do not have an aboriginal right of access to the Canyon mine site. Plaintiffs cannot prevail on their claim of right of access as set forth in their complaint. Accordingly, judgment shall be entered in favor of defendants on count II of plaintiffs' complaint.

VI. FOREST SERVICE APPROVAL OF THE PLAN OF OPERATIONS FOR THE CANYON MINE DOES NOT VIOLATE THE PLAINTIFF'S FIRST AMENDMENT RIGHT TO FREE EXERCISE OF RELIGION

The Havasupai assert that the Forest Service's decision approving the modification plan of operations for the Canyon Uranium Mine violates their first amendment rights to freely exercise their religion at the Canyon Mine site. The Havasupai assert that the Canyon Mine site is sacred and any mining will interfere with their religious practices at and near the mine, will kill their deities,

and destroy their religion or "Way." E.g., Complaint, at 7-11; V.2B-D.59-P.1827 (Transcript of Oral Presentation before the Deputy Religion Forester, May 14, 1987); V.3B-.D.122-P.3137-3143 (Affidavit of Four Havasupai Tribe members); V.3D.-D.176-P.3716-3825 (Transcript of Oral Presentation before the Chief of the Forest Service, February 25, 1987). For purposes of this section of analysis, the court can assume that all of plaintiffs' assertions about the religious sanctity of the Canyon mine site and adverse affects upon the Havasupai belief system are true.[7]

The case of Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 108 S. Ct. 1319 (1988) is applicable to the instant case and is dispositive of plaintiffs' first amendment claim. In Lyng, the Forest

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[7] Plaintiffs submitted a general offer of proof regarding the Havasupai religion on May 17, 1989.

Service had prepared a final environmental impact statement for a proposal allowing logging in, and construction of a six-mile paved road through the Chimney Rock section of the Six Rivers National Forest in California. It was undisputed that insofar as Indian religious practices were concerned the proposed actions would have severe adverse if not devastating effects. Id. at 451, 108 S. Ct. at 1326. The Supreme Court assumed that for purposes of their decision the government's action would "virtually destroy the Indians' ability to practice their religion." Id. (quoting the Ninth Circuit's opinion). Further, the Supreme Court recognized that the traditional religious practices were intimately bound up with the unique features of the Chimney Rock area and that the government's action would physically destroy those environmental conditions. Id. The Supreme Court determined that the "Constitution simply does not provide a

principle that could justify upholding" the Indians first amendment claims. Id. at 452, 108 S. Ct. at 1326-27. Similarly, in the instant case, the Forest Service's approval of the Plan does not violate the free exercise clause of the first amendment.

Plaintiffs here, as in Lyng assert that their religious and cultural belief systems are intimately bound up with the Canyon Mine site. Plaintiffs assert their belief that EFN's operations will destroy their religion. The Supreme Court, in Lyng, made the same assumption in reaching its conclusion of no first amendment violation. Accordingly, the court finds and concludes that no first amendment violation is present in this case.

Plaintiffs attempt to distinguish Lyng on several grounds, all of which the court finds to be unavailing. First, plaintiffs argue that coercion is present in this case as the Canyon Mine site is the embodiment and center of the Havasupai Tribe universe. The court

finds no distinction from Lyng which necessitates a different result. The majority specifically rejected the dissent's balancing approach, noting the practical impossibility of determining the centrality of a religious belief. Id. at 457-58, 108 S. Ct. at 1329-30. The Supreme Court did not find governmental coercion which implicated a "compelling justification" test. On this subject the court stated:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions. The crucial word in the constitutional text is "prohibit": "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Id. at 451, 108 S. Ct. at 1326 (quoting

Sherbert v. Verner, 374 U.S. 398, 412, 83 S. Ct. 1790, 1798 (1963) (Douglas J., concurring)).

The court can find no meaningful distinction between this case and Lyng. Plaintiffs are not penalized for their beliefs, nor are they prevented from practicing their religion.[8]

Second, plaintiffs argue that Lyng should be distinguished because this case involves private mining activities while Lyng involved the building of a road by the government. As in Lyng, however, fee title of the and in this case remains with the government. Union Oil Co. of California v. Smith, 249 U.S. 337, 349 (1919). "Whatever rights the Indians may have

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[8] The Havasupai do not necessarily have to be present at the Canyon Mine site to practice their religion. The "Way" is a state of mind--a religious or spiritual journey. V.3B-D.122-P.3139-40; "Our physical presence at the sacred places is not always required." Id. at P.3139. "Sometimes we go to this place to pray . . . . Sometimes we pray for that place from a distance." Id. at 3141.

to use the area . . . those rights do not divest Government of its right to use what is, after all, its land." Lyng, 485 U.S. at 453, 108 S. Ct. at 1327. Moreover, the Havasupai apparently have thousands of other religious sites within their former aboriginal lands. V.3D-D.176-P.3766. Giving the Indians a veto power over activities on federal land that would "easily require de facto beneficial ownership of some rather spacious tracts of public property." Id, at 453, 108 S. Ct. at 1327.

Finally, plaintiffs argue Lyng is distinguishable because there the Indians still have access to their religious site, where in the instant case, the mining laws give EFN the right to possession and exclusion of the Havasupai. Plaintiffs point to the fence and no trespassing signs at the Canyon Mine site in support of their claim that they are denied access to the site. There is no evidence in the record, however, to show the

plaintiffs have been denied reasonable access to the Canyon Mine site, that they have been treated any differently than the general public, or that any mining law has been applied against plaintiffs in a discriminatory manner. The court recognizes that plaintiffs access to the Canyon Mine site may be different from what they would like; however, any limitation does not amount to a violation of the first amendment.

This case is simply not distinguishable from Lyng. Plaintiffs cannot prevail on their claim based upon the free exercise clause of the first amendment. Accordingly, judgment will be entered in favor of the defendants on count I of plaintiffs complaint.

VII. FOREST SERVICE APPROVAL OF THE PLAN OF OPERATIONS FOR THE CANYON MINE DID NOT VIOLATE ANY FIDUCIARY DUTY OF THE GOVERNMENT TO THE HAVASUPAI

Plaintiffs contend that the Forest Service failed to recognize and consider the government's fiduciary duty to the Havasupai

in reviewing EFN's plan of operations throughout the administrative process. The court disagrees. The Deputy Regional Forester stated that:

> Federal agencies may have statutorily established fiduciary duties associated with the management of Indian lands and resources. No such duties are at issue here since the lands embraced within EFN's mining claims are National Forest System lands, not Indian lands. There is nothing in the record to support appellant's contention that the development and operation of the Canyon Mine on National Forest System land will have a deleterious effect on the Reservation . . .

V.4A-D.256-P.5234; see also V.5-D.256-P.5234 (concurrence by chief in decision on the merits). Furthermore, the Forest Service concluded that it "has met any fiduciary duty it may have through the exhaustive analysis undertaken from the Canyon Mine and the imposition of extensive monitoring, mitigation and reclamation measures." V.4A-D.256-P.5234.

It is undisputed as a general principle

that the federal government has broad fiduciary obligations to the Indian tribes akin to that of a guardian and a ward. E.g., Seminole Nation v. United States, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 1054 (1942); Vigil v. Andrus, 667 F.2d 931, 934 (10th Cir. 1982); Crain v. First National Bank, 324 F.2d 532, 535 (9th Cir. 1963). Any federal government action is subject to the government's general fiduciary responsibilities toward the Havasupai Tribe. See Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). It is equally clear that the federal government is not obligated to provide particular services or benefits, not to undertake any specific fiduciary responsibilities in the absence of a specific provision in a treaty, agreement, executive order, or statute. Vigil, 667 F.2d at 934; North Slope Borough Slope v. Andrus, 624 F.2d 589, 611 (D.C. Cir. 1980); Gila River Pima-

Maricopa Indian Community, 427 F.2d 1194. Plaintiffs allege that the specific fiduciary duty arises in the instant case from: (1) th Treaty of Guadalupe Hidalgo; (2) the American Indian Religious Freedom Act ("AIRFA"); (3) the GCEA; and (4) the government's general course of dealing with the Indians.

A. The Treaty of Guadalupe Hidalgo

The government of the United States and Mexico signed the Treaty of Guadalupe Hidalgo ("the Treaty") on February 2, 1848 ceasing hostilities between the two nations. 9 Stat. 992 (1848). Relying on United States v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986), plaintiffs contend that this Treaty secures them the religious right of access to the Canyon Mine site. Article IX of the Treat states:

> Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated

> into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

There is no dispute that the members of the Havasupai Tribe were citizens of the Mexican Territory at the time the Treaty was entered in 1848. In Abeyta, a member of the Isleta Pueblo was charged with the knowing possession of parts of a golden eagle without a permit in violation of the Bald Eagle Protection Act. 632 F. Supp. at 1302. The use of eagles and their feathers in religious ceremonies constituted an indispensable part of an Indian ritual. Id. at 1303. The District Court for the District of New Mexico determined that the Bald Eagle Protection Act did not repudiate the guarantee of religious freedom under the

Treaty of Guadalupe Hidalgo. The district court considered the Treaty as an international compact securing religious freedom to Mexican citizens in the ceded territories. Id. at 1306. The district cour concluded that it was up to Congress to abrogate the Treaty. Id. at 1306-07. In light of the fiduciary relationship to the Indians, the district court determined that Congress did not intend to repudiate the protections the court believed had been created by the Treaty. Id. at 1306-07.

This decision from the District Court fo the District of New Mexico is not binding upo this court, nor does this court find it to be persuasive. First, the validity of the decision is questionable in light of United States v. Dion, 476 U.S. 734, 106 S. Ct. 2216 (1986). In Dion, the Supreme Court concluded that a treaty[9] with the Yankton Sioux Tribe

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[9] The treaty at issue in Dion was an 1858 treaty to hunt the bald or golden eagle on th (Cont.)

did not protect an Indian from prosecution under the Eagle Protection Act. Id. at 743, 106 S. Ct. at 2222. See also U.S. v. Thirty Eight Golden Eagles, 649 F. Supp. 269, 277-278 (D. Nev. 1986) (holding, contrary to Abeyta, that Bald Eagle Protection Act not facially unconstitutional burden to Indian's right to free exercise of religion). The second and more compelling reason, however, is the plain language of the Treaty of Guadalupe Hidalgo itself. The Treaty guaranteed the residents of what is now Arizona and New Mexico, formerly of Mexico, the right to "free exercise of religion without restriction" until they became "incorporated into the Union of the United States." Thereafter they would

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Yankton Reservation. The Supreme Court determined that the Bald Eagle Protection Act abrogated any Indian treaty rights. The Supreme Court, of course, was not faced with the Treaty of Guadalupe Hidalgo, nor did it reach the issue of whether the Bald Eagle Protection Act was read to aborgate religious treaty rights. See Id. at 746.

be entitled to "the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution." The Treaty, by its own terms, does not create any right beyond the constitutional religious freedom rights. The Treaty simply affords those rights to residents in the area prior to statehood. The court finds and concludes that no specific fiduciary duty is created by the Treaty of Guadalupe Hidalgo.

B. American Indian Religious Freedom Act - (AIRFA)

Plaintiffs reliance on AIRFA is misplaced. AIRFA provides that it is:

> the policy to the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996. AIRFA does not create a cause of action or any judicially enforceable rights. Lyng, 485 U.S. 455, 108 S. Ct. at 1328. In an attempt to distinguish Lyng, plaintiffs assert that the plaintiffs in Lyng brought a separate count under AIRFA, while here, the Havasupai claim is related to a breach of a fiduciary duty. Plaintiffs purported distinction is unavailing.[10] The

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10 The bill's sponsor, representative Udall called it "'a sense of Congress joint resolution,' aimed at ensuring that 'the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration.' Lyng at 456, 108 S. Ct. at 1329, (citing 124 Cong. Rec. 21444 (1978)). Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it." Id. Plaintiffs assert that the Forest Service did not make a clear decision that the Havasupai religious concerns must yield. AIRFA does not declare an overriding federal policy to protect Indian religious or grant a veto over agency action. Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983) and 464 U.S. 1056 (1984). The Forest Service made considerable effort to gain information from the Havasupai. The (Cont.)

court agrees that AIRFA does impose an obligation on a federal agency to protect Indian religious freedom. However, AIRFA does not create a specific fiduciary relationship or the obligations imposed by such a fiduciary relationship. Wilson v. Block, 708 F.2d 735, 745-47 (D.C. Cir.), cert. denied, 464 U.S. 956, 104 S. Ct. 371 (1983) and 464 U.S. 1056, 104 S. Ct. 739 (1984). AIRFA requires a federal agency to evaluate their policies and procedures with the aim of protecting Indian religious freedom, to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies, and to consult with Indian organizations in regard to the proposed

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Forest Service considered the information it did receive. EFN cannot deny reasonable access to the public, including the Havasupai. The Forest Service is required to the extent possible to avoid unnecessary interference with the Havasupai during the operation of the mine. AIRFA requires no more.

action. AIRFA does not require Indian traditional religious considerations to always prevail to the exclusion of all else. 708 F.2d at 745-46. AIRFA requires the federal agency to consider, but not necessarily defer to Indian religious values. It does not prohibit agencies from adopting land uses that conflict with traditional Indian religious beliefs or practices. Id. at 747. An agency undertaking a land use project will be in compliance with AIRFA if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation it avoids unnecessary interference with Indian religious practices. Id. 747.

The court finds and concludes that the Forest Service has fulfilled its obligations to the Havasupai Tribe under AIRFA through its undertakings during the NEPA process.

C. Grand Canyon National Park Enlargement Act - (GCEA)

As previously discussed, see supra V., the GCEA does not create a right of access for the plaintiffs to the Canyon Mine site. Accepting plaintiffs' interpretation of the GCEA would be a prerequisite to its assertion that the statute creates a fiduciary duty toward the Havasupai. Since the court has found that no right of access was reserved to the Havasupai Tribe in the GCEA, the court finds and concludes that no fiduciary duty is created thereby.

D. General Government Fiduciary Duty

Plaintiffs also assert a fiduciary duty based upon a general course of dealing between the United States and the Havasupai. In Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), the Ninth Circuit examined similar fiduciary duty claims. There, the Environmental Protection Agency ("EPA") had approved the Northern Cheyenne

Tribe's redesignation of its Reservation from a Class II to Class I air quality standard. The Crow Tribe challenged the EPA approval of the redesignation as not considering the effects of the action upon their reservation. The Ninth Circuit stated, however, "that adequate procedures were provided by the Clean Air Act and the EPA regulations to fulfill this responsibility." Id.

Similarly, the court finds that the Forest Service satisfied any general fiduciary duty it may have had to the Havasupai Tribe by complying with the NEPA statute and regulations, as discussed below.

In conclusion, the court finds and concludes that the grounds set out by the Havasupai fail to establish the violation of government fiduciary duty or responsibility to the Indian tribe. Accordingly, judgment shall be entered in favor of defendants on count III of plaintiffs' complaint.

VIII. THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et. seq. seeks "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . ." Id. § 43211 See also § 4331 ("Congressional declaration of national environmental policy"). The goal of the NEPA is to ensure that federal agencies carefully consider the environmental consequences of actions they undertake. The NEPA process requires an agency to take certain steps in evaluating the potential impacts of proposed actions, including the preparation of an Environmental Impact Statement ("EIS") under certain circumstances. Id. at § 4332 (requirements of a federal agency in fulfilling this national policy); 40 C.F.R. § 1501. The procedures set

forth in regulations promulgated by the Counsel on Environmental Quality at 40 C.F.R. § 1500-17. ("CEQ Regulations")[11] implement the NEPA requirements. As discussed, the Forest Service decided to prepare and EIS and gave formal notice of the decision on April 30, 1985.

The established procedures for EIS preparation require four basic steps: (1) "scoping"; (2) data gathering and publication of a draft EIS: (3) public comment on the draft EIS; and (4) publication of the final EIS and "Record of Decision."[12] The purpose of an EIS is to both "provide decisionmakers with enough information to aid in the substantive decision whether to proceed with

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11 The relevant CEQ Regulations during 1985 and 1986 (as well as the present regulations) are the same.

12 For a concise summary of these steps, See Memorandum of Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company in Support of Motin for Summary Judgment and Statement of Facts, at 45-46.

the project in light of its environmental consequence, and to provide the public with information and an opportunity to participate in gathering information." Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985). The fact that an EIS discloses that a proposition may have some adverse effects on the environment or human health does not necessarily indicate a violation of NEPA. See e.g., Id. at 1058. An EIS need not discuss remote and conjectural environmental consequences. See e.g., Sierra Club v. Hodel, 544 F.2d 1036, 1039 (9th Cir. 1976), but only every reasonable alternative. Citizens for a Better Henderson, 768 F.2d at 1057.

While the NEPA does set forth significant substantive goals for the federal government, the duties imposed upon an agency are "essentially procedural." Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227, 100 S.Ct. 497, 500 (1981). The NEPA

does not impose any substantive requirements or priorities upon agencies, and does not restrict the decisions or choices that an agency makes so long as the decision is fully informed and well considered. Id. at 227-28, 100 S.Ct. at 500.

Before the court for review is the Forest Service's approval of EFN's Modified Plan of Operations. Plaintiffs have exhausted their administrative remedies. Judicial review of the Forest Service's decision is governed by the standards set out in the Administrative Procedure Act, 5 U.S.C. § 706. Accordingly, a reviewing court cannot impose its judgment on an agency.[13] The proper role for the court is to ensure that the Forest Service adequately considered and disclosed the environmental

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13 "NEPA was designed 'to insure a fully informed and well considered decision,' but not necessarily, 'a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decision making unit of the agency.' Strycker's Bay, at 227-28, 100 S.Ct. at 500.

impact of its action that its decision was not arbitrary and/or capricious. Id.; see also Baltimore Gas & Electric Co. v. N.R.D.C., 462 U.S. 87, 97 (1983). The adequacy of an EIS depends upon whether it was prepared in observance of the procedure required by law. 5 U.S.C. § 706(2)(D); Animal Defense Council v. Hodel, 840 F.2d 1432, 1435-36 (9th Cir. 1988); State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). The Ninth Circuit has adopted a "rule of reason," test that requires inquiring into whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences, and whether the EIS's form, content and preparation foster both informed decisionmaking and informed public participation. Once satisfied that the agency has taken this procedural and substantive "hard look" at environmental consequences in the EIS, the court's review is at an end. Animal Defense Council at 1435-36;

State of California v. Block at 761.

Within this framework of review, the Havasupai Tribe alleges that the EIS prepared by the Forest Service is deficient and fails to comply with the procedural requirements of NEPA. Specifically, the Havasupai Tribe alleges that the EIS for the Canyon Uranium Mine: (1) fails to consider the "no action alternative" or not approving the Plan of Operations for the mine; (2) fails to give adequate consideration to the plaintiffs' religious and cultural interests in the site; (3) is based on incomplete hydrogeological information; (4) fails to adequately consider the environmental impact of disposal of radioactive waste; and (5) fails to adequately consider the environmental cumulative impacts of mining in the region in which the Canyon Mine is located. If the EIS fails to comply with NEPA, the court must remand the case to the Forest Service for such further action as may be necessary to comply with the statute.

The court will discuss each of these issues i
turn.

A. The No Action Alternative.

NEPA requires that an EIS provide information in detail and consider every reasonable alternative to the proposed action. Citizens for a Better Henderson, 768 F.2d at 1057; see 42 U.S.C. § 4332(2)(c)(iii) The analysis of the varying alternatives constitutes the heart of the EIS. The CEQ Regulations contemplate that an EIS will include a no-action alternative to permit the agency and the public to address the option. 40 C.F.R. § 1502.14(d). In the instant case, the Forest Service selected five alternatives including the no action alternative.

The Havasupai Tribe alleges that the Forest Service never considered any alternative other than approval of the Canyon Uranium Mine. Plaintiffs allege that the entire EIS process was used as a means to justify an end. See 40 C.F.R. § 1502.2(g)

(EIS shall assess environmental impact of proposed agency actions, rather than justifying decisions already made). The basis for plaintiffs' assertion consists of alleged statements by Dennis Lund, the Forest Supervisor who had primary responsibility in drafting the EIS. Plaintiffs contend that Mr. Lund stated that Forest Service was going to approve the Plan of Operations because it did not have legal authority to deny it. See V.2A-D.30-P.1051, 1053 (March 13, 1985 letter from Joe P. Sparks to Dennis Lund).[14] The

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14 The March 13, 1985 letter states that: "The Tribe disagrees with your statement made in a conversation with Margaret Vick of our office on February 3, 1985 that the alternative of no mining is not available." V.2A-D.30-P.1051, 1053. In addition, Mr. Lund was quoted in several newspaper articles as saying that the alternative of no mine was not viable because of legislation passed by Congress. V.2B-D.62-P.2038 (Williams News, Thursday, March 7, 1985); Id. at P.2041 ("Wolf's Den by Dave Wolf, Arizona wildlife News, March 1984, at p. 7); Id. at P.2053 (Williams News, Thursday 24 1985). Those same newspaper articles encourage interested parties to submit written comments on the mine proposal to the Forest Service.

court finds, however, that the Forest Service considered the no action alternative in a manner consistent with established law and procedures and did not use the NEPA process to justify a decision already made.

The formal Notice in the Federal Register which initiated the scoping process indicates a "range of alternatives for the development of the proposed mine including, but not limited to, approval of the proposal, approval of the proposal with specific mitigation measures and no action, will be considered". V.2A-D.37-P.1222, 50 Fed. Reg. 18,281). Moreover, the Forest Service clearly described its approach to the no-action alternative in the final EIS:

> The No Action Alternative, for the purposes of this environmental evaluation, would involve disapproval of the Plan of Operations for the Canyon Mining Project. The plan would be returned stating the reasons for disapproval and request the proponent to submit a new plan that would meet the environmental and administrative

> constraints. While the Forest Service can require or impose reasonable environmental controls or conditions on an operating plan, they do not have the authority to disapprove a reasonable operating plan for a mining operation which will be conducted in a reasonable and apparently environmentally responsible manner (re: General Mining Law and 36 C.F.R. 228). The use of this alternative, however, is consistent with previous Forest Service administrative decisions to treat the no action mining alternative as the no project option. It provides a sound baseline against which all other options can be compared.

V.1B-D.3-P.513.

The draft EIS stated that "[t]he Forest Service does not have the authority to categorically deny operations proposed under the mining laws." V.1A-D.1-P.24. The final EIS states that the Forest Service is without authority to deny "a reasonable operating plan for a mining operation which will be conducted in a reasonable and apparently environmentally responsible manner." V.1B-D.3-P.513; see also

V.2A-D.37-P.1168 (Forest Supervisor's responsive statement to the Uranium Mine Appeal).

In direct response to a comment of the Havasupai Tribe on the draft EIS, the final EIS provides:

> We agree that the range of alternatives to be considered is not limited by the agency's authority. Thus, the EIS includes the No Action Alternative . . . The consideration of the No Action Alternative was expended in the final EIS. However, it would be inaccurate if the EIS did not reflect to some extent the rights of a mining claimant under the General Mining Law and recognize some limits on Forest Service discretion when reviewing a Plan of Operations. The No Action Alternative is fully considered and evaluated. However, the EIS properly notes the limitations in implementing that alternative.

V.1B-D.4-P.774. (Final EIS appendix 6, Public Comment and Forest Service Response).

The court finds that the Forest Service properly recognized its authority and

limitations in evaluating the no action alternative. This conclusion is implicit in both the draft and final EIS. The Regional Forester explicitly made this apparent point in his decision on the merits of the appeal from the Forest Supervisor's September 29, 1986 decision. The Regional Forester stated that:

> The Forest Service does have the authority to disapprove unreasonable plans of operations and, thereby, to implement the no action alternative. If all, or portions of a plan of operations do not contain reasonable requirements for surface resource protection, and the operator is unwilling or unable to make the necessary changes, then the Forest Service has the authority to disapprove all, or portions, of the plan.

V.4A-D.188-P.3943 (emphasis added). The Forest Service cannot categorically deny an otherwise reasonable plan of operations. United States v. Weiss, 642 F.2d 296 (9th Cir. 1981). Of course, the Forest Service would

have the authority to deny an unreasonable plan of operations or a plan otherwise prohibited by law. E.g., 16 U.S.C. § 1538 (endangered species located at the mine site). The Forest Service would return the plan to the claimant with the reasons for disapproval and request submission of a new plan to meet the environmental concerns. V.1B-D.3-P.513.

In Weiss, the owners of unpatented mining claims had been enjoined for failure to comply with Forest Service regulations by not filing an approved plan of operations. The Ninth Circuit affirmed the injunction. The Ninth Circuit noted that "[m]ining has been accorded a special place in . . . laws relating to public lands."- 642 F.2d at 299. As long as prospectors complied with the federal and state laws, "locators of mining locations were given 'the exclusive right of possession and enjoyment of all the surface included within the lines of their location,' along with the

subsurface rights." Id. (quoting 30 U.S.C. § 26).

The Ninth Circuit also recognized an important interest in preserving and protecting the forests and parks on the public lands. Id. The Ninth Circuit stated that "the important interests involved here were intended to and can coexist." Id. With respect to the Secretary of Agriculture's authority and responsibility to maintain and protect the national forest lands, the Ninth Circuit stated:

> While prospecting, locating, and developing of mineral resources in the national forests may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition, the Secretary may adopt reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment of placer claims for mining purposes.

642 F.2d at 299 (footnote omitted)) see also 16 U.S.C. § 478; 30 U.S.C. § 21a.

The court's review of the record reflects

that the Forest Service properly considered the no action alternative as one of five alternatives in the EIS. The no action alternative meant disapproval of the plan of operations and no mine. V.1A-D.1-P.51 (DEIS). The NEPA does not expand the authority of the Forest Service to include rejection of an otherwise reasonable plan of operations. Cf. Cape May Green, Inc. v. Warren, 698 F.2d 179, 188 (4d Cir. 1983). Th Forest Service was required to compare the no action alternative with the beneficial and adverse impacts of the other alternatives. See Kilroy v. Ruckelshaus, 738 F.2d 1448, 145 (9th Cir. 1984); "Forty Most Asked Questions concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18027 (March 17, 1981) (When agency under court order or legislative command to act, the no action alternative "provides a benchmark to compare magnitude of environmental effects of action alternatives.").

The Forest Service was also required by regulation to describe the existing environment. 40 C.F.R. § 1502.15. The Forest Service recognized that the environmental effect of the no action alternative envisioned leaving the environment in its unaltered natural state. V.1A-D.1-P.119 (DEIS). The Forest Service acknowledged that many groups, including the Havasupai Tribe, expressed interest in the no action alternative during the scoping process. See V.2C-D.62-P.1996 (Analysis of Public Comment Relating to Canyon Mine). The no-action alternative was denominated as "Alternative #1." V.1B-D.3-P.513 (FEIS); V.1A-D.1-P.51 (DEIS). Chapter 3 of the draft EIS includes a thirty-nine page description of the existing environment, which in this instance also effectively describes the effect of selecting the no-action alternative V.1A-D.1-P.79-117. Chapter 4 of the draft EIS discusses the environmental consequences of all alternatives, including

further discussion of the no-action alternatives, including further discussion of the no-action alternative. Id. at P.119, 123 126.

Plaintiffs and others commented on the no-action alternative. Appendix G to the final EIS includes the "no-action" comment letters received by the Forest Service on the draft EIS and the Forest Service's analyses o and responses to these letters. V.1-D.4-P.702-04; Id. at P.750; Id. at P.751; Id. at P.769, 773-74. Of the 238 letters received b the Forest Service, 74 letters, some with multiple signatures, opposed the mine altogether preferring Alternative #1. Id. at P. 694. The Forest Service's response to eac comment that addressed the no-action alternative reflect its detailed considerati of the alternative. The "Comparison of Alternative" section in Chapter 2 of the fina EIS depicts in eight tables the effect of selecting Alternative #1 and evidences the

detailed consideration of each alternative. V.1B-D.3-P.535-46. The responsiveness of Alternative #1 to the resolution of each of the various identified "issues and concerns" was also discussed in the final EIS. V.1B-D.3-P.547-50; Id. at P.477-80 (summary).

The Forest Service properly utilized the no action alternative as a baseline for comparison of the other alternatives. The Forest Service responded to comments on it. In light of the reasonableness of the plan of operation, the Forest Service correctly approved a modification plan of operations submitted by EFN.[15]

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[15] Plaintiffs' assertion that the process was used to justify a decision already made is unsupported as demonstrated by the vast amount of time and effort spent by the Forest Service in preparation of the EIS. It must be noted that the Plan of Operation that was first presented to the Forest Service was not the Plan that came out. The Forest Service required several modifications, including the realignment of a power line, the redesigning of the surface water diversion configuration; a modified haul route, and incorporation of a wildlife habitat. See V.1A-D.6-P.924-25.

Plaintiffs also assert some miscellaneou violations. Plaintiffs contend that EFN has enclosed the mine yards with a fence and posted it against trespassing. Plaintiffs argue that this construction violates 40 C.F.R. § 1502.2 (f) which states that agencie "shall not commit resources prejudicing selection of alternatives before making a final decision." The court finds and concludes that no violation has occurred nor has any action been taken that would prejudic the administrative or judicial decisionmaking process. The court finds and concludes that the agency treatment of the no-action alternative was reasonable and the Forest Service has taken the requisite "hard look." See Animal Defense Council, 840 F.2d at 1435-36.

B. Consideration of the Havasupai Religious Concerns

NEPA requires that the environment considered by the federal agency include not

only such traditional environmental concerns as water and air quality, but also the historic cultural and natural aspects of our national heritage, in order to preserve an environment which supports diversity and variety of individual choice. 42 U.S.C. § 4331(b) (4). The Havasupai Tribe concedes that the Forest Service, in response to plaintiffs comments on the draft EIS, added religious concerns to the issues evaluated in detail in the final EIS. V.1B-D.3-P.472 (FEIS); Id. at D.6-P.919 (Record of Decision in FEIS). The Havasupai Tribe, however, contends that this evaluation was conducted in a manner contrary to law and the agency findings regarding this issue were arbitrary and capricious. The court disagrees.

The record demonstrates that until May 1986 plaintiffs never raised the issue regarding the religious or cultural value of the mine site. The record reflects that religious concerns were considered by the

Forest Service in its analysis even though the plaintiffs did not bring the matter up until late in the administrative process and, even then, in a manner that made it difficult for further analysis. The record indicates that mining exploration activities commenced at the site in March 1977. V.4B-D.215-P.4665. Activities included a ground magnetic survey and a gravity survey. Id. Exploration drilling began at the site in 1978 and the spring of 1985. Id. at P.4665-66. In 1979, the Canyon Mine project area was investigated by archaeologists from Northern Arizona University in connection with exploration drilling. V.2C-D.62-P.2096. For eight years all exploration activity and archaeological work occurred without comment or expressed opposition by the Havasupai regarding their religious concerns. V.3D-D.186-P.3918.

After nearly a decade of exploration and other activities, EFN filed its Plan of Operation in late 1984. A review of the

contact with the Havasupai Tribe and its legal counsel is of benefit in the determination of this issue. In November 1984, the Forest Service sent the Havasupai and some 1700 others a letter requesting comments on EFN's proposal. V.2C-D.62-P2005. The proposal was also heavily publicized. See Id. at P.2037-70. The record fails to reflect that any religious concerns were raised by the Havasupai Tribe at this time.

In November of 1984, Abajo Archaeology began a preliminary archaeological survey of the area. V.2C-D.62-P.2100. The purpose of the archaeological survey was to investigate the cultural-historical background of the project area. Id. at P.2102. By letter dated January 18, 1985, the Forest Service notified the Havasupai Tribe of Abajo's application to the Forest Service to conduct a more complete archaeological investigation of the mine site. V.2A-D.37-P.1414. The letter requested that the Havasupai contact the Forest Service

within thirty days to "discuss their interest including ways to avoid or mitigate potential harm or destruction of this site." Id. By letter dated February 15, 1985, Margaret Vick responded to the January 18, 1985 letter. Id at P.1416. The letter indicated that "the Tribe wishes to consult with the Forest Service's prior to issuance of a Permit to Abajo Archaeology. Id. The letter also indicated that the Havasupai Tribe objected t the Forest Service's issuance of a permit until such consultation was completed. Id. By letter dated April 8, 1985, the Forest Supervisor responded to Ms. Vick's letter. H state in part:

> In our (January 18, 1985) letter we sought comments from the Havasupai to assist us in determining if either of these sites had religious or cultural significance for the Tribe. We feel that concerned Indian tribes should function as advisors to our decision-makers and that input from the tribes can be used in determining if a project should proceed as planned or should be modified

> in some way. Thus we further sought to determine if the Havasupai Tribe desired to meet with the Forest Service to discuss measures which might mitigate potential harm to the sites.

Id. at 1417. The letter notes that the applicable regulations require thirty day notice to affected tribes and further acknowledges Ms. Vick's February 15, 1985 letter. The letter notes that it had been over eighty days since the Forest Service notified the tribe and that several unsuccessful attempts were made to contact Ms. Vick. Id. Further, the letter requested a meeting to discuss mitigation measures. Id. Finally, the letter notes that the Forest Service had received repeated inquiries from Abajo Archaeology on its permit and that the Forest Service would proceed with issuance of the permit "unless we have heard from you within two weeks of your receipt of this letter." Id. at P.1417. The record fails to indicate a response to this inquiry by the

Havasupai. The Havasupai argue that there is no statutory duty to respond. The court agrees. However, "it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' positions and contentions this is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory . . ." such as Indian religious beliefs. Vermont Yankee, 435 U.S. 551, 553, 98 S.Ct. 1197, 1216 (1978). The April 8, 1985 letter is indicative of the Forest Service's efforts to obtain information from the Havasupai concerning the religious and cultural significance of the Canyon Mine site and to solicit suggestions which might mitigate potential harm to the site.[16] By memo dated

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[16] Plaintiffs contend that there is a distinction between approval of an excavation permit and approval of the plan of operations. The contacts concerning the (Cont.)

April 23, 1985, the Forest Supervisor indicated that it had received no response to its April 8, 1985 letter to Ms. Vick and that the permit should be issued. V.3A-D.94-P.2896. In May of 1985, the Forest Service issued a permit to Abajo Archaeology. The record fails to indicate any Havasupai objection to this activity or any suggested interference with their religious and cultural beliefs.

The scoping process officially began on April 30, 1985 with the publishing of the notice of intent to prepare an EIS. V.1B-D.3-P.487. The Forest Service solicited comments to help define the issues to be considered in the draft EIS. A scoping meeting was held on May 15, 1985 to define the issues for the draft EIS. Id. Prior to the official scoping

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excavation permit are indicative of the Forest Service's effort to gain information from the Havasupai and of the plaintiffs' failure to provide such information.

period, on March 13, 1985, Joe Sparks wrote a letter (which has been characterized by the plaintiffs as a "scoping letter") to Mr. Lund. V.3A-D.94-P.2891. The letter did refer to "sacred" springs in the context of the groundwater aquifer of the area. Id. The letter did not raise any issue of the religious significance of the Canyon Mine site itself. It is difficult to understand why plaintiffs were able to reveal this religious issue and not reveal any religious conflicts occurring at the mine itself.

In March of 1985, EFN representatives traveled to Supai Village and met with the entire Havasupai Tribal Council over a period of two days. EFN representatives described in detail the location of the mine site, the preceding decade of exploration work at the site, and the proposed activities of EFN. V.4B-D.215-P.4533-34 (Intervenor's Reply to Statement of Reasons of Various Appellants Opposing Approval of EFN Plan of Operation);

V.2B-D.43-P.1548-52 (Affidavit of Brad Doores). Present at the meeting were the Tribal Council, EFN representatives; John R. Adams, Chairman of the Board, Robert M. Steele, mining engineer, and Brad Doores. Id. at P.1548. The affidavit of Mr. Doores indicates that Mr. Adams described the location of the proposed mine site and described the extent of the surface disturbance at the site. Id. at P. 1549. Mr. Steele asked if anyone from the council had any questions. Id. at 1550. Though questions were raised, no issues were raised during the meeting concerning the religious or cultural significance of the mine site. Id. at P.1550-52.

The record indicates that the Havasupai Tribe was provided with a regular opportunity to participate in the NEPA process and stay abreast of the mining proposal and raise any issues of concern to it. See e.g., V.3A-D.94-P.2855-56 (Memorandum in Opposition to Stay of

EFN Mining Plan of Operation); Id. at P.2903 (groundwater report); Id. at 2904 (radiological assessment); Id. at 2917 (groundwater monitoring program).

A letter from the Forest Supervisor on December 5, 1985 to Ed McElwain, Tribal Planner, is indicative of the manner in which the NEPA process was conducted. Id. at 2917. The letter states:

> The draft environmental impact statement for the Canyon Mine proposal will be available for public distribution soon. Comments of the Havasupai Tribe, received in response to our previous letters, have been incorporated into the analysis. At this time, we ask if any additional issue or concerns have surfaced since your last correspondence to us that should be addressed in the environmental impact statement before the initial printing.

Id. The record fails to reflect any response to this letter or any additional concerns by the Havasupai Tribe prior to the publishing of the draft EIS in December of 1985 and released to the public in February of 1986.

The draft EIS notes that "no specific sacred sites at the mine site had been identified near the mine site or any of the proposed ore haul routes." V.1A-D.1-P.124. The Chief of the Forest Service notes and the court agrees that: "There were several points in time when it would have been logical for the Havasupai to have objected to the disturbance of the Canyon Mine site, yet such objections were not made." V.3D-D.186-P.3918 (Decision of the Chief re: Request for Stay of Administrative Decision). Plaintiffs contend that it is sacrilege to tell about their religion and that they did not think it would be of any value. Regardless of the reason for the plaintiffs' failure, it further supports the absence of a record on the religious concerns during the NEPA process.

By letter dated May 12, 1986, comments on the draft EIS were made on behalf of the Havasupai. V.1B-D.4-P.766 (Appendix 6 to Final EIS). This letter contained the first

mention by the Havasupai that the mine site had religious significance. The substance of those comments were:

> Traditional camps and burial sites are located within the proposed mine area which are sacred to the Supai
>
> Detailed identification of the religious, cultural and ceremonial significance of the site would be considered sacrilege by the Tribe. However, in the Tribe's effort to protect this site they have authorized us [Sparks & Siler] to disclose the following information.
>
> The proposed mine site lies in the path of the Coconino Kachina who is sacred to the Supai and is the Guardian of the Canyon for the Hopi.
>
> The mine site also lies across the Red Paint and Salt Trails which are sacred to the Supai and which were recognized as such by Congress in the Grand Canyon Enlargement Act . . . .

Id. The letter also states that AIRFA required that the no action alternative should be implemented. Id. at P.766. These general claims came after a substantial period of

dialogue had occurred between the parties.[17]

The Forest Service received a second set of comments from Vice Chairman Alfred Hanna dated May 30, 1986. However, these comments did not mention any religious significance of the mine site. V.3A-D.94-P.2928.

The issue concerning the religious significance of the Canyon Mine site was ultimately brought to the attention of the Forest Service. There is no statute, case law or other authority that requires the Forest Service to accept any comments or statements at face value. Consistent with the policy of AIRFA and its obligations under NEPA, the Forest Service immediately tried to develop additional substantive information concerning

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[17] The comments provided little substantive information to the Forest Service. Compliance with CEQ Regulations requires that comments shall be "as specific as possible." 40 C.F.R. § 1503.3. It is of some significance to compare the detailed comments the Havasupai Tribe gave on their groundwater concerns with the initial expression of their religious concerns.

each of the comments so that they could be considered in the administrative process. The Administrative Record reflects that the Forest Service pursued efforts to gain additional information on three fronts. See V.2A-D.37-P.1164-68 (Responsive Statement for Canyon Mine appeal). First, the Forest Service contacted the Havasupai for more information. Second, the Forest Service contacted Dr. Euler, an anthropologist long associated with the Havasupai for his views. Third, the agency researched the available literature.

The Forest Service first contacted the Havasupai by letter dated June 11, 1986. V.3A-D.94-P.2939. The letter is important in several aspects. The letter notes the surprise of the Forest Service, since no one had made any reference to such an issue during the scoping process or during periodic consultations with the tribe. Id. It goes on to state: "Nevertheless, we fully appreciate

the significance of your comment and which to begin working with the Tribe immediately to identify any religious or cultural sites which might be affected by development of the mine or associated haul routes so that any impacts can be fully evaluated in the final EIS." Id. The Forest Service again requested an immediate visit to the mine site and noted that additional information was "absolutely necessary to evaluate potential impacts and to plan avoidance or mitigation measures which will protect tribal religious freedoms and respond to your concern,." Id.[18] The letter further noted that it was important to proceed quickly, and requested that the mine visit take place within two weeks. Id. This letter is indicative of the Forest Service's effort

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[18] The Havasupai assert that there can be no mitigation and no compromise. They do not want any mining to occur at the Canyon Mine site or in the area of the Grand Canyon. E.g., V.3D-D.176-P.3747; V.2C-D.62-P.1929; 1934, 1963; V.2A-D.37-P.1333.

to gain information on the Havasupai religious concerns and to confer about those concerns in the context of mitigation and protection of the Tribe's religious freedoms.

The next contact is a letter dated June 26, 1986 by Wayne Sinyella to the Forest Supervisor. V.3A-D.94-P.2940. The letter requested an additional sixty days to respond to the June 11, 1986 letter asking for information on the religious significance of the Canyon Mine site.

The Havasupai had agreed to meet with the Forest Service at the Canyon Mine site, but apparently cancelled the meeting. By letter dated July 2, 1986, the Forest Supervisor wrote to Mr. Sinyella regarding the Tribe's cancellation of the joint inspection at the Canyon Mine site. Id. at P.2941; see V.1B-D.3-P.472. The letter notes that the visit needed to be concluded within the next fourteen days so that the information could be included in the final EIS. V.3A-D.94-

P.2941. The record fails to reflect any response to this letter or that any joint inspection at the Canyon Mine site occurred.

By letter dated August 1, 1986, Mr. McElwain gave notice to the Forest Supervisor that the last comments that the Havasupai would make for inclusion in the final EIS would be mailed shortly. Id. P.2942. By letter dated August 4, 1986, the Havasupai did submit three comments, including one entitled "Determination of Impacts to Religious and Cultural Resources." Id. at P.2944, 2948. There, the Havasupai alleged that the process used by the Forest Service has been faulty. Id. at P.2948. The Havasupai allege that other members should have been contacted and that the Forest Service should have made more of an effort to work for a mitigation. Id. The Forest Service tried to elicit information from the Tribal Chairman, the Tribal Planner, legal counsel, the Tribal Counsel. These were the logical persons to contact. The letter

relating to "Additional Comment on Canyon Min EIS" while attacking the process of the Fores Service, did not provide any additional substantive information on the religious concerns of the Havasupai. The August 4, 198 letter was specifically addressed by the fina EIS in a special "Addendum to Appendix G." V.1B-D.4-P.872.

In addition to contacting the Havasupai directly, the Forest Service contacted Dr. Robert Euler with respect to the Havasupai's religious concerns expressed in their May 12, 1985 comments. V.4B-D.215-P.4671, 4674 (Intervenor's Reply to Statement of Reasons o Various Appellants Opposing Approval of EFN Plan of Operation). Dr. Euler's knowledge of the Havasupai was based upon some thirty year of experience working with the and studying the Tribe, including testifying on behalf of the Havasupai before the ICC. Dr. Euler met with the Forest Service in Williams, Arizona and spoke with Forest Service representatives

on the telephone. Id. at P.4673. Dr. Euler was asked about the concerns expressed in the May 12th letter. Dr. Euler was unable to provide any information that would confirm that a conflict existed between the mine and any specific Havasupai religious practices or sites. Id. at P.4677-80. Dr. Euler acknowledged that "[i]t is possible that facts concerning certain religious or cultural practices and sites of the Havasupai may exist but are not known to me." Id. at P.4674. Plaintiffs dispute Dr. Euler's knowledge. Plaintiffs claim to be the only real experts on their religion. This is difficult to dispute. However, plaintiffs failed to provide sufficient information or identify specific religious areas at the Canyon Mine site. Plaintiffs protest the fact that Dr. Euler's participation was not given more prominent attention in the final EIS. The final EIS, however, notes that the Indian experts were only one among three sources each

of whom failed to identify "specific Indian sacred or religious sites . . . near the mine site." V.1B-D.3-P.651-52; V.1B-4-P.771. The plaintiffs requested disclosure of the Indian "exert". V.2A-D.30-P.1090; see C.F.R. § 1502.17. The Record indicates that Dr. Euler did not play a major role in the EIS preparation. His opinion ultimately proved to be consistent with the plaintiffs' failure to identify specific religious sites at the Canyon Mine site. The failure to identify Dr. Euler earlier in the NEPA process does not constitute a defect in the EIS preparation which would require preparation of a new EIS or a supplement thereto.

The last avenue the Forest Service pursued to obtain additional information on the Havasupai religion as it related to the Canyon Mine site (the May 12, 1986 letter) was a review of the available literature. This information did not appear particularly useful in confirming the Havasupai's claims. See

V.2A-D.37-P.1160, 1336-1405 (Responsive Statement for Canyon Mine Appeal Exh. 7).[19]

The Forest Service's efforts were documented in the final EIS which provides:

> The potential impact of the Canyon Mine on Indian religious sites and practices was considered in the DEIS in conjunction with a general analysis of impacts on American Indians. Comments on the DEIS by the Hopi and Havasupai Tribes alleged that religious sites and practices would be adversely affected by the Canyon Mine, a concern which was not raised by the Tribes during scoping or earlier consultation with the Tribes. Based on those comments, and continuing consultation with the affected Tribes, the Forest Service has added Indian religious concerns to the list of issues evaluated in detail by the EIS. The text of the FEIS includes an expanded discussion of Indian religious

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[19] Plaintiffs claim that the review was not thorough in light of the failure by the Forest Service to examine Dr. Euler's previous work (see Plaintiffs' Responsive Brief, Ex. A). The record, however, reflects that a 1974 edition of this work was considered and included in a Bibliography of materials on the Havasupai. Id. at P.1404; V.2A-D.37-P.1160.

sites and practices in the affected area. The Forest Service has also requested a meeting with tribal representatives at the proposed mine site to identify any specific sacred sites that might be disturbed by mining activity. to date, neither Tribe has committed to a visit to the mine site. Consultations with the Tribes regarding religious concerns will continue beyond the completion of the NEPA process. V.1B-D.3-P.472.

The final EIS continues:

In completing this environmental impact statement, the Forest Service has attempted to identify Indian concerns, both religious and environmental, through the formal scoping process and through informal consultation with tribal leaders.

The Hopi and Havasupai Tribes have suggested that sacred religious sites, including ruins, graves and hunting areas exist at or hear the mine site and haul routes. However, consultation with the Tribes and experts on Indian religious sites and practices as well as archeological inventories have failed to identify any specific Hopi or Havasupai sites of sacred or religious significance near the proposed

mine site. Id. at P.608.

Finally, under the section Environmental Impacts on Indian Religious Concerns, the final EIS provides:

> After communications and consultation with Hopi and Havasupai Tribal leaders and experts on Indian religious sites and practices as well as an archeological investigation of the mine site, no specific Indian sacred or religious sites have been identified near the mine site. The Tribes maintain that Indian religious interests will be adversely affected but have not identified specific sites which are threatened. In addition, a review by an expert in Indian religious sites and practices had failed to identify sites that would be affected by the proposed action. Consultation with tribal leaders will continue. Id. at P.651-2.

The Record of Decision again reflects the Forest Service's findings, wherein it sets forth:

> "[T]he current level of religious activity is not expected to be curtailed by any alternative nor will access to any known religious sites or area be restricted. Although,

> there is no physical evidence of Indian religious activity at the mine site itself, the Havasupai have recently stated that sacred camping and burial sites are present in the general area north of Red Butte, and perhaps at the mine site itself. However, the Havasupai Tribe refuses to disclose the location of the sites. The Havasupai Tribe has also recently stated that the general area around the mine is important to the tribes religious well being because it lies within the sphere of existence or a continuum of life extending generally from the Grand Canyon to Red Butte." V.1B-D.6-P.923.

In sum, the Forest Service responded directly to the comments in the draft EIS regarding Havasupai religious concerns contained in the May 12, 1986 and August 4, 1986 letters in the final EIS and Record of Decision.

The EIS process closed and the final EIS and Record of Decision were released on September 26 and 19, 1986. The Forest Service, consistent with its statements in the final EIS, pursued the matter with the

Havasupai Tribe. On August 28, 1986 representatives of the Forest Service met with members of the Havasupai and Hopi Tribes in Tusayan, Arizona. See V.3A-D.80-P.2705. By letter dated September 8, 1986, Joe Sparks summarized the meeting and the concerns of the Havasupai Tribe. Id. The letter states, in part:

> The Havasupai Tribe has informed you that the Canyon Mine site is a sacred religious site within larger sacred areas. For the reasons set forth in this letter the Tribe cannot, without risk of religious sacrilege and interference with and disruption of the present and future practice of their religion, explain anymore (sic) than what was told to Mr. Lund and Mr. Chacon last week.
>
> The site is within the large area south of Red Mountain that includes the path of the Coconino Kachina and the sacred Red Paint Way and sacred Salt Way. The proposed mine will destroy the continuum of life which is indispensable and central to the Havasupai religion.
>
> The site is also very near the

> burials of Havasupai Tribal members, whose living relatives participated in the burial ceremonies. Id.

The September 8, 1986 letter notes that what appears to be a newly state religious concern with focus upon the Havasupai "continuum of life". The administrative appeal process provided the plaintiffs additional opportunity to make their religious concerns known to the Forest Service and EFN.

Plaintiffs contend that there is no statutory deadline for publication of the final EIS and that the Forest Service should have done an extensive study on the Havasupai religious claims as done in Lyng. In Lyng, however, the Indians made it perfectly clear that the proposed actions would infringe on their religious beliefs and gave information that led to the study. A determination of the need for such a study would be in the agency's discretion. Under the circumstances of this case, the Forest Service's conduct was

reasonable. Plaintiffs who claim to be the only experts on the Havasupai religion would not speak of their religion directly or reveal details concerning the manner in which the proposed mining activity would interfere with their religious beliefs and or practices. V.3B-D.122-P.3142 (Havasupai Tribe Affidavit). The Forest Service studied the effects of the mining plan on American Indians in general. It was not unreasonable to conclude that a further study would have been unproductive. Accordingly, it was not an abuse of the agency's discretion not to conduct further studies under the facts and circumstances of this case.

Finally, in letter dated September 24, 1986, the EFN responded to the Havasupai Tribe's concerns raised in the meeting and the September 8th letter. V.3A-D.94-P2953. EFN requested specific information on the religious practices so that it could evaluate the claimed conflict and try to avoid or

lessen any possible impact. The record fails to indicate a response to this letter.

It is clear from this analysis, that the Forest Service complied with NEPA and took the required "hard look." The Havasupai continuously claim that they are the only ones that know their religion, yet the record clearly shows that they were not forthcoming on the subject during the scoping process or the comment period leading up to the publication of the final EIS, nor would they identify specific sites of religious significance. The Havasupai Tribe argues that the Forest Service did not make a sufficient effort, but the record reflects that the plaintiffs did not respond to numerous attempts for more specific information.

The Supreme Court has stated that:

> [A]dministration proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after

> failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the grounds the agency failed to consider matters "forcefully presented."

Vermont Yankee Nuclear Corp., 435 U.S. 519, 553-54, 98 S.Ct. 1197, 1217 (1978). The issued raised in the May 12, 1986 letter resemble the types of cryptic references that were viewed unfavorably in Vermont Yankee. The court recognizes that the nature of the Havasupai religion is inherently a personal and secret issue. However, the law requires revelation in exchange for further recognition, consideration, and mitigation. The Forest Service took every reasonable step to develop these comments and discussed each in the final EIS. The Forest Service agency repeatedly sought clarification of plaintiff's comments. However, the Administrative Record reflects that the Havasupai declined to participate or structure their participation in a meaningful manner during the

administrative action. Accordingly, the plaintiffs cannot complain that the agency's consideration of their religious concerns was inadequate.

The court finds and concludes that the Forest Service took appropriate action under NEPA and the policy of AIRFA to investigate and consider the religious concerns of the Havasupai Tribe. The Forest Service complied with the applicable laws and did not make any findings that were arbitrary or capricious under the facts and circumstances of this case.

C. Ground Water and Surface Hydrology Analysis

Plaintiffs allege numerous deficiencies regarding the hydrologic and hydrogeologic analyses contained in the EIS. Plaintiffs argue that the EIS should be supplemented to correct these deficiencies. The court disagrees and finds and concludes that the agency took appropriate measures to

investigate and consider these issues.

Plaintiffs contend that the "unique and special geological conditions of the Canyon mine area were not considered in the water analysis. Plaintiffs' Opening Brief, at 81. The record clearly reflects that the particular geological conditions of the Canyon Mine area were thoroughly considered in the water analysis. The Forest Service retained a consulting hydrologist who had primary responsibility in coordinating this area of the EIS. See V.1B-D.3-P.657. Appendix "F" to the draft EIS is the report on "Groundwater Conditions" for the Canyon Mine region prepared by Errol L. Montgomery & Associates, Inc. ("EMA"). V.1A-D.2-P.383-460. The "Groundwater Conditions" report includes extensive considerations of hydrogeologic conditions, structural features and characteristics of breccia pipe formations, water well data from over 150 existing wells and exploration bore holes in the Canyon Mine

site area, groundwater circulation and chemical quality of groundwater, and a groundwatering monitoring program. The EIS discusses actual data relating to previous drilling in the Canyon Mine site. V.1A-D.2-P.404-05, 432-36 (table 1). The EIS notes the specific nature of the breccia pipe deposits. Id. at P.391. The EIS reflects that the Havasupai received portions of the groundwater report and by letter dated September 10, 1985, EMA further explained the results of the chemical analyses to the Mr. McElwain, Tribal Planner for the Tribe. Id. at P.452-56.

With respect to surface water, Appendix "D" to the draft EIS is a report on "Downstream Hydrologic Impacts" by Dr. Charles Leaf. V.1A-D.2-P.312-37.

The Record reflects that these reports and the draft EIS went to numerous federal, state, and local agencies, including the EPA and the Department of the Interior. Id. at

P.153-54.

Plaintiffs contend that the Forest Service failed to consult with the United States Geological Survey, however, the U.S.G.S. is a subagency of the Department of the Interior and the Department did receive and comment upon the EIS. Plaintiffs also contend that federal and state nuclear regulatory agencies should have been consulted. Uranium mining had been exempted from regulatory requirements of these agencies. See Reporter's Transcript of Proceedings, vol. 7, at 42-43 (Jan. 10, 1939 ; id., vol. 10, at 27-28 (Jan. 13, 1989). The EPA was consulted and it had responsibility to deal with the environmental concerns (i.e., leaching) raised in the Plan of Operations. The court finds and concludes that the Forest Service circulation of the Plan was reasonable and appropriate.

The Havasupai and their counsel submitted numerous comments to the Forest Service

concerning the surface and groundwater reports. V.1-B-9.4-P.767-67, 778, 872-873. The Forest Service responded in detail to every comment submitted by the plaintiffs. See Id. at P.772-73, 779-80, 875. The Forest Service transmitted plaintiffs comments to the consulting firms for review and response. EMA supplemented its earlier report specifically responding to plaintiff's contentions. V.2B-D.43-P.1616-53. The final EIS contained an expanded discussion on potential groundwater impacts. V.1B-D.3-P.472.

After the Record of Decision was published, the Havasupai Tribe continued to challenge the groundwater and surface water analyses. Dr. David K. Kreamer, an expert hydrologist and consultant to the Havasupai Tribe, gave an opposing viewpoint on the studies previously done on behalf of the Forest Service. See V.2B-D.59-P.1811-12. Dr. Kreamer contended during the administrative process that this information was not

sufficiently site related. See Id. The Forest Service expert, EMA, directly responded to those contentions. V.4C-D.234-P4921-26.[20] There was no need to consider the specific geological information regarding breccia pipe formations and the aquifer underlying the site.

Plaintiffs also argue that there are no

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[20] The EMA report states: "The essential information is available for assessment of potential for groundwater contamination from mine operations, and results of extremely conservative analyses indicate that this potential is low." Id. at 4922.

The report also concludes: "For environmental impact investigations, technical assumptions are combined with available data to project impacts. In hydrogeologic investigations, as for other sciences that evaluate natural conditions in the field, the technical assumptions are selected to provide conservative estimates with a sufficient measure of safety regarding conditions that are not known precisely. For the Canyon Mine groundwater investigation, extremely conservative assumptions were used to prepare quantitative estimates for potential impact. Results of construction and testing of the new monitor/supply well at the Canyon Mine have provided valuable site-specific data that has confirmed many of the previous assumptions for the site." Id. at P.4921.

studies in the EIS which indicate that a single monitoring well will detect contamination from the mine site. V.1B-D.3-P.778. This contention did receive substantial consideration by the Forest Service. See V.1B-D.3-P.530, 649; Id. D.4-P.764-65, 773, 796; V.2A-D.37-P.1151; V.2D-D.64-P.2325-26; V.4B-D.214-P.4259-61, 4266-67, 4272; V.4C-D234-P.4919-20. With regard to the direction of the flow of water, the Forest Service expert responded that "[t]he monitoring/supply well would be within the area where seepage would encounter the groundwater table, regardless of the direction of movement of the seepage after it mixes and is diluted with the groundwater. The precise direction of groundwater movement in this aquifer at the mine site is not required to establish an effective monitoring program to detect potential contamination from mining operations." V.B-D.214-P.4272. "The monitor/supply well is located near enough to

the breccia pipe to be within the basal area of the inverted cone of percolation. Therefore, the well is located properly." V.2A-D.28-P.1001.

The Forest Service clearly addressed the capability of the monitoring well to detect contamination in the Canyon Mine area. The Forest Service expert concluded that "the well and existing pump assembly are capable of creating a cone of depression in the groundwater table which would intercept potential contaminants and thereby provide both a monitoring capability for early detection and a facility for reclamation of potentially contaminated groundwater." V.4B-D.214-P.4267.

Plaintiffs also contend that in the event that contamination is detected at Havasu, Blue and Indian Garden Springs, it would be too late for reclamation. The Forest Service expert, EMA, made it clear that the on-site monitoring of the well was not intended to

comprise the sole reclamation effort in the unlikely event of groundwater contamination: "Additional wells might be required to conduc proper reclamation. However, it is neither standard nor good practice to design and implement a reclamation system before contamination is detected . . . ." V.4C-D.234 P.4919.

Plaintiffs further argue that the exposure of the radioactive materials in the naturally occurring rock will increase the leaching process and contamination into the groundwater. The approved plan of operation calls for waste materials to be put back into the mine site after completion of the mining operations. B.1-D.1-P.56. It is unclear wha deficiency plaintiffs allege. The Forest Service discussed this issue in detail. V.1A D.2-P.426-27; V.1B-D.3-P.647-50; V.1B-D.4-P.772. It is undisputed that some leaching i occurring now, as well as in the past. V.1A-D.2-P.426-27. Some leaching is likely to

occur after mining. Id. at P. 426-27. Apparently, the amount of leaching will be reduced since EFN will mine and remove the richest mineralized rock. See Id. at P.426-27. This matter has been fully considered by the Forest Service.

In conclusion, as the administrative process progressed, EMA responded and supplemented its reports to various issues raised by the Havasupai Tribe and others. Plaintiffs are basing their arguments upon disagreements among experts. A disagreement among experts does not invalidate an EIS. See Cady v. Morton, 527 F.2d 786,796, (9th Cir. 1975) (citing Life of the Land v. Brinegar, 485 F.2d 460, 472 (9th Cir. 1973). An EIS does not have to resolve all contentions so long as it sufficiently identifies them so that the decision maker can make an informed decision. Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977). As to the issues raised by the Havasupai

Tribe, they were examined in detail, responded to, and resolved consisted with the NEPA process; - nothing more is required under NEPA. The fact that plaintiffs disagree with the result is insufficient to show that there has been a deficiency in the NEPA process.

D. Disposal of Radioactive Waste

Lastly, plaintiffs object to the final EIS on the grounds that it impermissibly bifurcates the project by only addressing the mine, and not considering the disposal of radioactive waste generated by the mine.

Plaintiffs' objection could be construed several ways. First, plaintiffs could be concerned with the disposal of high level nuclear wastes generated by end users of the mine's products. The final EIS addresses this issue at V.1A-D.3-P.487. The Forest Service determined that questions regarding the off-site generation and disposal of high level nuclear waste would not be addressed by the EIS because those concerns were too far

removed from the project. The court agrees. There is no indication that the production of such waste will have any impact on the mine or surrounding areas. Furthermore, projects generating high level nuclear waste would have to comply with a broad range of applicable regulations, including the NEPA.[21]

Plaintiff's objection could also be construed as a concern over the manner of disposing of uranium ore extracted from the mine with too low an ore content to economically transport for processing. The final EIS proposes either hauling such ore to a previously approved location, or disposing

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[21] Plaintiffs reliance on City of Rochester v. United States Postal Service, 541 F.2d 967 (2nd Cir. 1976), and Alpine Lakes Protection Society v. Schlapfer, 518 F.2d 1089 (9th Cir. 1975) is misplaced. In those cases, no EIS had been prepared. In this case, an extensive EIS was prepared, but the scope was limited in the sense that the issue of disposal of high level nuclear waste material was not determined to be sufficiently related to the Canyon Mine site to require further discussion.

of it underground in the mined-out workings. V.1B-D.3-P.514. Because it is unclear whether plaintiff is objecting to either of these disposal techniques, the court finds it appropriate to address the Forest Service's analysis of both.

The only objection to off-site disposal on the record is a letter containing comments on the draft EIS sent by the Hopi Tribe to Mr Lund on April 30, 1986 See V.1B-D.4-P.756. In its response to the objection the Forest Service concluded that the possibility of off-site low level ore disposal was remote, and that if it ever became necessary, an amendment to the Plan of Operation, subject to review under NEPA would have to occur before a site could be chosen. V.1B-D.4-P.764.

The court finds and concludes that the Forest Service's decision regarding off-site disposal is reasonable. Furthermore, plaintiffs will have ample opportunity to protect their interests should the issue arise

in the future by participating in renewed review under NEPA.

Regarding disposal of low level ore by replacement in mined-out workings, the Havasupai commented on the EIS as follows:

> The Groundwater Report ignores the fact that the proposed reclamation plan calls for the mine ore and contaminated materials to be dumped into the mine shaft after mining operations cease. There is no information on the effects from leaching from these contaminated materials, nor is there any information on the flow of contaminated water between aquifers after mining operations cease and pumping from the mine shaft is stopped.

V.1B-D.4-P.767. The Forest Service responded that:

> The comment that mine ore and contaminated materials will be dumped into the mine shaft after mining operations cease is not accurate. Much of the rock removed from the breccia pipe will be barren or slightly mineralized waste rock. Uranium ore will be removed and trucked to a distant processing plant. During post-mining reclamation operations, only the barren or slightly

> mineralized waste rock may be replaced into the mine. The result will be to replace native high-grade uranium ore with the native barren or relatively non-mineralized waste rock. Mining operations may promote oxidation and increase the potential mobility of radioactive materials. However, the quantity of radioactive minerals remaining to be leached will be reduced significantly below pre-mining levels from the removal of high-grade ore. If perched groundwater recharge due to rainfall and snowmelt drains through the sealed Canyon Mine shaft after reclamation, concentrations of radioactive minerals from the waste rock are anticipated to be small, approaching the range of monitoring instrument error, even in the unlikely event that such minerals eventually reach the referenced springs . . . .

V.1B-D.4-P.772. It should be noted that the ore will be hauled to EFN's licensed mill at Blanding, Utah, which has a daily design capacity that exceeds the scheduled ore production of the Canyon Mine site. It is estimated that the Canyon Mine site will take up only 10% of the mill processing capacity.

V.1B-D.3-P.481. Plaintiffs contend that the impacts in Blanding, Utah should have been considered by the Forest Service. See 40 C.F.R § 1508.25. The Forest Service's decision not to include these distant impacts in this site specific examination was reasonable. In addition, the final EIS also contained an expanded discussion of subsurface water issue in response to the Havasupai's concerns. Id. at 645-50.

The court finds and concludes that the Forest Service made a reasonable determination that the impacts of this proposal on the issue of disposal of high level nuclear waste was "too far removed" from the Canyon Mine. Furthermore, the Forest Service's plan adequately deals with the disposal of low level ore-bearing material, whether it is to be replaced in mined-out workings or ultimately removed off-site.

E. Cumulative Impacts

Plaintiffs final alleged NEPA deficiency

concerns the Forest Service's treatment of cumulative impacts. Plaintiffs contend that the Forest Service refused to study the cumulative impacts of past, present, and reasonably foreseeable uranium mining in the area and that the Forest Service erred in not preparing a regional EIS. The court disagrees.

The CEQ regulations require "cumulative actions" to be considered. 40 C.F.R. §§ 1508.7 and 1508.25. The final EIS clearly sets forth the Forest Service's approach to analyzing cumulative effects:

> The potential for uranium mining on the Tusayan Ranger District on the Kaibab National Forest south of the Grand Canyon, is uncertain and problematical. While literally thousands of mining claims have been filed in the Tusayan area, this has little relation to the number of mines that may ultimately be developed. There are no known proposed mines other than the Canyon Mine, on the Tusayan Ranger District south of the Grand Canyon. The highly speculative nature of mineral prospecting and

> exploration, the fact that mining claims are located prior to discovery of a mineral deposit, the current depressed conditions of the domestic uranium market and the highly localized nature of breccia pipe deposits, all contribute to the difficulty in predicting the extent of future uranium developments. Because the exact schedule and location of future mining is not possible to predict, this EIS analyses potential cumulative impacts by hypothesizing the addition of several new mines in the area, developed concurrently with the Canyon Mine.

V.1B-D.3-P.489 The record reflects that no other uranium mining proposals on the Tusayan Ranger District south of the Grand Canyon were made at the time of the release of the draft and final EIS. V.1A-D.1-P.28; V.1B-D.3-P.483. EFN has acknowledged that it has filed applications to lease state lands for exploration of two sites west of the Canyon Mine site. 2A-D.37-P.1424. Plaintiffs contend that, when considering "cumulative impact", there should be no distinction between exploration and actual mining. While

exploration would have some impact on the environment, the speculative nature of mining in the Grand Canyon remains and thus consideration of exploration alone would not contribute materially to an analysis of the cumulative impacts of other mines in the area. These application leases are not the equivalent of other mines and treatment to the contrary would be speculative. See Id. at P. 1424. The Forest Service is not required to consider purely speculative activities. See Kleppe v. Sierra Club, 427 U.S. 390, 410, 96 S.Ct. 2718, 1730 n.20 (1976): Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 783 (9th Cir. 1980). The Canyon Mine site only encompasses thirty-four acres. The Plan of Operations for the Canyon Mine site does not constitute a regional plan of development nor is a regional plan required.

Therefore, the court finds and concludes that the Forest Service's consideration of the cumulative impacts issue was reasonable and

appropriate under the facts and circumstances of this case.

F./ Conclusion on NEPA Claims

The EIS for the Canyon Mine site contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the Canyon Uranium Mining Proposal. The environmental effects were clearly put before the decision makers. The court has examined the record and is satisfied that the action of the Forest Service was appropriate in all respects. The action of the Forest Service in the preparation of its evaluation of the Canyon Mine Proposal and in responding to the comments of plaintiffs was thoughtful and complete on all issues. The court recognizes the sincerity of the beliefs held by the Havasupai Tribe and the sincerity of the disagreements it has with EFN and the Forest Service, however, the court finds no violations of the National Environmental

Policy Act. The Forest Service acted in compliance with the law, the procedures of NEPA, and did not undertake their duties in an arbitrary or capricious manner. Accordingly, judgment shall be entered in favor of the defendants on count IV of plaintiff's complaint.

Based on the foregoing,

IT IS ORDERED affirming the decision of the Chief of the Forest Service approving the modified Plan of Operations for the proposed Canyon Uranium Mine.

FURTHER ORDERED granting judgment in favor of each of the defendants and against each of the plaintiffs on all counts of plaintiff's complaint and plaintiffs take nothing thereby.

FURTHER ORDERED vacating the stay in this matter thirty (30) from the date of the entry of the judgment herein.

DATED this 18th day of April, 1990.

s/
HONORABLE ROGER C. STRAND
U.S. DISTRICT COURT JUDGE

HAV-104420

§ 228i. Havasupai Indian Reservation

(a) Lands of Havasupai Reservation Addition held in trust by United States: boundaries

For the purpose of enabling the tribe of Indians known as the Havasupai Indians of Arizona (hereinafter referred to as the "tribe") to improve the social, cultural, and economic life of its members, the lands generally depicted as the "Havasupai Reservation Addition" on the map described in section 2289b of this title, and consisting of approximately one hundred and eighty-five thousand acres of land and any improvements thereon, are hereby declared to be held by the United States in trust for the Havasupai Tribe. Such map, which shall delineate a boundary line generally one-fourth of a mile from the rim of the outer gorge of the Grand Canyon of the Colorado River and shall traverse Havasu Creek from a point on the rim

at Yumtheska Point to Beaver Falls to a point on the rim at Ukwalla Point, shall be on file and available for public inspection in the Offices of the Secretary, Department of the Interior, Washington, District of Columbia.

(b) Lands held in trust by United States included within Reservation: administration pursuant to laws and regulations applicable to other trust Indian lands: specific administrative criteria and restrictions

The lands held in trust pursuant to this section shall be included in the Havasupai Reservation, and shall be administered under the laws and regulations applicable to other trust Indian lands: Provided, That --

(1) the lands may be used for traditional purposes, including religious purposes and the gathering of, or hunting for, wild or native foods, materials for paints and medicines;

(2) the lands shall be available for use by the Havasupai Tribe for agricultural and grazing purposes, subject to the ability of

such lands to sustain such use as determined by the Secretary;

(3) any areas historically used as burial grounds may continue to be so used;

(4) a study shall be made by the Secretary, in consultation with the Havasupai Tribal Council, to develop a plan for the use of this land by the tribe which shall include the selection of areas which may be used for residential, educational, and other community purposes for members of the tribe and which shall not be inconsistent with, or detract from, park uses and values; Provided further, That before being implemented by the Secretary, such plan shall be made available through his offices for public review and comment, shall be subject to public hearings, and shall be transmitted, together with a complete transcript of the hearings, at least 90 days prior to implementation, to the Committees on Interior and Insular Affairs of the United States Congress; and Provided

further, That any subsequent revisions of this plan shall be subject to the same procedures as set forth in this paragraph;

(5) no commercial timber production, no commercial mining or mineral production, and no commercial or industrial development shall be permitted on such lands: Provided further, That the Secretary may authorize the establishment of such tribal small business enterprises as he deems advisable to meet the needs of the tribe which are in accordance with the plan provided in paragraph (4) of this subsection;

(6) non-members of the tribe shall be permitted to have access across such lands at locations established by the Secretary in consultation with the Tribal Council in order to visit adjacent parklands, and with the consent of the tribe, may be permitted (i) to enter and temporarily utilize lands within the reservation in accordance with the approved land use plan described in paragraph (4) of

this subsection for recreation purposes or (ii) to purchase licenses from the tribe to hunt on reservation lands subject to limitations and regulations imposed by the Secretary of the Interior; and

(7) except for the uses permitted in paragraphs 1 through 6 of this subsection, the lands hereby transferred to the tribe shall remain forever wild and no uses shall be permitted under the plan which detract from the existing scenic and natural values of such lands.

(c) Establishment, maintenance, and implementation of conservation measures: availability of Federal programs relating to Indians; right of access to lands for implementation of Federal projects, resource management and preservation, and tribal religious, etc., functions

The Secretary shall be responsible for the establishment and maintenance of conservation measures for these lands, including, without limitation, protection from fire, disease, insects, or trespass and reasonable prevention or elimination of erosion, damaging

land use, overgrazing, or pollution. The Secretary of the Interior is authorized to contract with the Secretary of Agriculture for any services or materials deemed necessary to institute or carry out any such measures. Any authorized Federal programs available to any other Indian tribes to enhance their social, cultural, and economic well-being shall be deemed available to the tribe on these lands so long as such programs or projects are consistent with the purposes of section 228a too 228j of this title. For these purposes, and for the purpose of managing and preserving the resources of the Grand Canyon National Park, the Secretary shall have the right to access to any lands hereby included in the Havasupai Reservation. Nothing in sections 228a to 228j of this title shall be construed to prohibit access by any members of the tribe to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not otherwise covered in sections 228a to 228j of this title.

(d) Grazing rights on the Raintank Allotment; continuation and renewal

The Secretary shall permit any person presently exercising grazing privileges pursuant to Federal permit or lease in that part of the Kaibab National Forest designated as the "Raintank Allotment", and which is included in the Havasupai Reservation by this section, to continue in the exercise thereof, but no permit or renewal shall be extended beyond the period ending ten years from January 3, 1975, at which time all rights of use and occupancy of the lands will be transferred to the tribe subject to the same terms and conditions as the other lands included in the reservation in subsection (b) of this section.

(e) Havasupai Use Lands; use for grazing and other traditional purposes subject to regulations

The Secretary, subject to such reasonable regulations as he may prescribe to protect the scenic, natural, and wildlife values thereof,

shall permit the tribe to use lands within the Grand Canyon National Park which are designated as "Havasupai Use Lands" on the Grand Canyon National Park boundary map described in section 228b of this title, and consisting of approximately ninety-five thousand three hundred acres of land, for grazing and other traditional purposes.

(f) Extinguishment of all tribal right, title and interest in lands not otherwise declared as held in trust or covered by provisions enlarging Grand Canyon

By the enactment of sections 228a to 228j of this title, the Congress recognizes and declares that all right, title and interest in any lands not otherwise declared to be held in trust for the Havasupai Tribe or otherwise covered by sections 228a to 228j of this title is extinguished.

(Pub.L. 93-620, § 10, Jan. 3, 1975, 88 Stat. 2091).

HAV-104418

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In the Supreme Court of the United States

OCTOBER TERM, 1991

THE HAVASUPAI TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Havasupai Indian Tribe has the right to block development of a uranium mine on its former aboriginal lands in the Kaibab National Forest near the Grand Canyon.

2. Whether the district court erred in limiting judicial review of the plan of operations for the Canyon mine site to the administrative record of the Forest Service's decision to approve development of the mine.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1124

THE HAVASUPAI TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. a-3 to a-13, is reported at 943 F.2d 32. The opinion of the district court, Pet. App. a-14 to a-143, is reported at 752 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1991. A petition for rehearing was denied on October 9, 1991. Pet. App. a-1 to a-2. The petition for a writ of certiorari was filed on January 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves an attempt by petitioners, the Havasupai Tribe and individual members of that Tribe (the Havasupai or the Tribe), to prevent respondent Energy Fuels Nuclear, Inc. (EFN) from mining uranium on mining claims controlled by EFN in Kaibab National Forest near the Grand Canyon. Pet. App. a-14. The Havasupai assert that they have the right to control conduct and restrict activities on this National Forest land.

1. The proposed mine is located in an area regarded as sacred by the Tribe. In the late nineteenth century, the federal government removed the Havasupai from their extensive aboriginal lands around the Grand Canyon and placed them on a reservation about 35 miles away. The government later set apart some of these aboriginal areas as national parks and national forests, including the Kaibab National Forest, which is administered by the Forest Service in the Department of Agriculture. Pet. App. a-26 to a-27.

In 1946, Congress created the Indian Claims Commission to determine Indian claims against the federal government accruing as of that date. See Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.* (1976). In the 1960's, the Havasupai contended before the Commission that the Tribe had been wrongfully deprived of some of their aboriginal lands, including the area containing the proposed mine site at issue here. Pet. App. a-38 to a-40. In 1969, the Indian Claims Commission determined that the United States "had extinguished the [Tribe's] title to [its] lands" outside the Havasupai Reservation, see *Havasupai Tribe* v. *United States*, 21 Ind. Cl. Comm. 324 (1969). It awarded the Havasupai compensation for the taking of their lands in accordance with the

terms of a stipulated agreement between the Tribe and the United States. Congress thereafter authorized and appropriated the payment of the compensation awarded by the Commission. Pet. App. a-40; see Act of Dec. 26, 1969, Pub. L. No. 91-166, 83 Stat. 447; Act of Sept. 29, 1972, Pub. L. No. 92-438, 86 Stat. 741.

2. In October 1984, pursuant to Forest Service regulations, EFN submitted to the Forest Service a plan of operations to mine uranium on its unpatented mining claims in the Kaibab National Forest. Pet. App. a-17 to a-18. After EFN submitted a plan of operations for the mine, the Forest Service sent letters describing the proposed mine and requesting comments to more than 1,700 persons and organizations, including the Tribe. *Id.* at a-94 to a-95. The Forest Service received more than 200 responses, including a letter from the Tribe that referred to "sacred" springs fed by the aquifer underlying the area. However, the letter did not state that the mine site had any other religious significance.

Based on these responses, the Forest Service decided to prepare an environmental impact statement (EIS). Pet. App. a-20; *id.* at a-99 to a-100. The Forest Service elicited suggestions on the scope of the EIS from more than 2,000 federal, state, and local agencies, news media and other interested persons, including the Havasupai, and held a formal meeting in Flagstaff, Arizona. *Id.* at a-20 to a-21; *id.* at a-99. The Havasupai did not submit any additional comments on the scope of the EIS. *Id.* at a-99 to a-100.

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[1] In March 1985, representatives of EFN met for two days with the Havasupai Tribal Council, and described the company's mining proposal in detail. During the meeting, the Tribe's representatives said nothing about any religious significance of the site. While the EIS was being prepared, the Forest Service retained experts to conduct a study of the cultural and religious values of the site. The Tribe never

Three months after the Forest Service issued the draft EIS, the Tribe informed the Forest Service that the area around the mine site was sacred to the Tribe. Pet. App. a-103 to a-104. The Havasupai declined, however, to identify specific religious sites that might be affected so that the Forest Service could fully evaluate the effects of the mine in the final EIS. *Id.* at a-120. The Forest Service arranged to meet with the Tribe's representatives at the mine to identify specific sites, but the Tribe cancelled the meeting and thereafter failed to agree to a site visit. *Id.* at a-108 to a-109. Likewise, the Tribe's comments on the draft EIS said nothing about the religious significance of the mine site. *Id.* at a-110. Nonetheless, preparation of the final EIS included an extensive inquiry into the potential effects of the Canyon Mine on the Tribe's sacred lands, and these concerns were discussed in the final document. *Id.* at a-93.[2]

3. In September 1986, the final EIS was published and the Forest Supervisor issued a Record of Decision approving EFN's modified plan of operations on September 26, 1986. Pet. App. a-21. The Tribe appealed the decision to the Regional Forester and the Chief of the Forest Service, submitting extensive documentation to support their position that they were entitled to block development of the mine. *Id.*

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objected to the investigation of the area on religious grounds; nor did it identify issues of concern to it. Pet. App. a-95 to a-101.

[2] In addition to reviewing numerous scholarly publications about the Tribe, the Forest Service consulted with an anthropologist who had studied the Havasupai extensively and who had testified as an expert on behalf of the Tribe before the Indian Claims Commission in the Tribe's successful suit for compensation for the aboriginal lands. Pet. App. a-106 to a-110; *id.* at a-112.

at a-21 to a-23; see also Resp. EFN Br. in Opp. 10-13. On June 9, 1988, the Chief of the Forest Service approved a modified plan of operations for the Canyon Mine. Pet. App. a-21 to a-22. The Secretary of Agriculture determined that he would not review the Chief's decision on the merits. Accordingly, the Chief's decision became the agency's final determination. *Id.* at a-22 to a-23.

4. In June 1988, petitioners filed suit in the United States District Court for the District of Arizona against the United States, the Department of Agriculture, the Forest Service, the Secretary of Agriculture, and subordinate officials of the Forest Service, challenging the Forest Service's decision approving the modified plan of operations for the Canyon Mine. Pet. App. a-14 to a-15; *id.* at a-22 to a-23.

The complaint asserted that (1) the approval of the mining plan violated the Havasupais' First Amendment rights freely to exercise their religion; (2) the mining operations would deprive them of their aboriginal right of access to the mine site, which they claimed was guaranteed under the Grand Canyon National Park Enlargement Act (the Enlargement Act), 16 U.S.C. 228a *et seq.*; (3) the Forest Service breached its fiduciary duty to the Tribe; and (4) the EIS for the mine failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. a-15 to a-16.

Respondents filed a motion in the district court to limit review to the 5,288-page administrative record. The district court granted the motion, Pet. App. a-16 & n.1, but permitted the Havasupai to conduct discovery upon a showing of "adequate justification regarding the particular discovery request." See Order of July 28, 1988, at 6. The Tribe subsequently filed mo-

tions to Produce the Administrative Record and to Take Discovery, arguing that the record submitted to the district court was not the complete administrative record. On September 8, 1988, the district court denied petitioners' motions. Pet. App. a-16 & n.1.

5. On April 18, 1990, the district court affirmed the agency's decision approving EFN's modified plan of operations for the Canyon Mine. Pet. App. a-14 to a-143. The court found, *inter alia*, that the Havasupais' aboriginal title had been extinguished prior to the 1975 enactment of the Enlargement Act. The court noted that several courts have determined that the reservation of lands for national forest purposes effectively extinguishes Indian aboriginal title. See *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976). Relying, *inter alia*, on *United States* v. *Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989), the court also found that the Havasupais' assertion of aboriginal title was barred by the Indian Claims Commission's award of compensation to the Tribe in 1969 and Congress's payment of that award, as well as by principles of res judicata.[3]

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[3] In finding that the Tribe was barred by the prior Claims Commission decision from asserting its rights of access, the court also relied on the fact that, at the time compensation was awarded, the Tribe "expressly stipulated that [it] would be barred from asserting any claim with respect to [its] aboriginal land." Pet. App. a-41 to a-42.

The court further noted that "Section 70u(a) of the Indian Claims Commission Act[,] [25 U.S.C. 70u(a) (1976),] is a statutory bar which provides that '[t]he payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.' " Pet. App. a-40. The court found that the Tribe's claim of a right of access to the uranium mine site " 'touches'

The court determined that the Enlargement Act did not preserve any affirmative right of access by the Tribe to the mine site, since that right had previously been extinguished. It also held that the Act did not create or confirm any Tribal right to control activities on any non-trust land outside the Reservation, nor did it define a trust responsibility on the part of the United States with respect to the areas at issue. Pet. App. a-51 to a-52, a-72.[4]

6. Petitioners appealed to the Ninth Circuit. They challenged the district court's order restricting its review to the administrative record and contended that the EIS was inadequate, particularly with respect to the evaluation of the effects of mining on groundwater. Petitioners also argued that the Enlargement Act authorized the Tribe to prevent mining at the Canyon Mine site. Pet. App. a-8.

The Ninth Circuit, in a *per curiam* opinion, affirmed. Pet. App. a-3 to a-13. It upheld the district court's decision to deny petitioners' discovery request and limit review to the administrative record filed by the Forest Service. The court noted that the Tribe's claim that the agency considered evidence outside the

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a matter involved in the prior case before the Indian Claims Commission because the Canyon Mine site is within the area of land that was in controversy during those proceedings." As a result, the court concluded, the Tribe "cannot avoid the statutory bar." *Id.* at a-40 to a-41.

[4] The district court also held that the Forest Service's EIS was adequate under NEPA, Pet. App. a-74 to a-142, rejected the contention that the Forest Service's approval of the mining plan of operations violated the government's fiduciary duty to the Tribe, *id.* at a-61 to a-73, and ruled that approval of the mining plan did not violate the Tribe's First Amendment right to the free exercise of religion. *Id.* at a-54 to a-61. Petitioners do not challenge any of these rulings here.

record was "purely speculative" and that petitioners had failed to demonstrate that "the Chief of the Forest Service acted in bad faith or relied on materials outside the administrative record." *Id.* at a-8 to a-9.

The court also rejected the Tribe's claim, in reliance on the Enlargement Act, of a "right of access, essentially amounting to an easement, to the area that includes the mine site." Pet. App. a-11. It agreed with the district court's conclusion that the Tribe's aboriginal title was extinguished prior to enactment of the Enlargement Act, when the Indian Claims Commission ordered Congress to pay—and Congress did pay—compensation to the Havasupai. Therefore, the court explained, aboriginal title was not extinguished by the Enlargement Act, and Section 228i of the Act did not operate as a "condition upon the Tribe's relinquishment," under which the Tribe retained "an easement to any religious site included within the land it gave up." Pet. App. a-11 to a-12.

ARGUMENT

The court of appeals' decision is correct, is consistent with the decisions of this Court and other courts of appeals, and presents no issue that warrants this Court's review.

1. The court of appeals correctly rejected petitioners' claim that Section 228i(c) of the Enlargement Act, 16 U.S.C. 228i(c),[5] grants the Tribe the right to

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[5] This provision provides, in pertinent part:

> Nothing in sections 228a to 228j of this title shall be construed to prohibit access by any members of the [Havasupai] tribe to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not otherwise covered in sections 228a to 228j of this title.

prevent development of a uranium mine on EFN's claims. Before this Court, petitioners essentially repeat their argument before the courts below that "the first and only act of Congress extinguishing Havasupai aboriginal title was the [Enlargement Act]," Pet. App. a-43, a-11, and that the Tribe retained aboriginal title in the lands until the Act was passed in 1975. Petitioners thus maintain that in extinguishing title, the Enlargement Act placed a "condition upon the Tribe's relinquishment" under which the Tribe retained "an easement to any religious site included within the land it gave up." Pet. 16-17; see Pet. App. a-11 to a-12.

Petitioners' argument fails. Aboriginal or Indian title, as a permissive right of occupancy, may be extinguished at any time "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941). Executive action is sufficient to extinguish Indian title as long as it is not "wholly unauthorized by Congress," or as long as Congress "acquiesce[s]" in the action of the Executive Branch. *United States* v. *Dann*, 706 F.2d 919, 928-929 (9th Cir. 1983), rev'd in part on other grounds, 470 U.S. 39 (1984).

As the court of appeals held, the Tribe's aboriginal rights were completely extinguished well before Congress enacted the Enlargement Act. First, the federal government forcibly removed the Havasupai from their aboriginal land and confined them to a reservation. Second, the government incorporated the former Havasupai lands into national forests. Third, the Indian Claims Commission awarded the Havasupai compensation for the aboriginal lands taken by

the government, and Congress authorized payment of the compensation.[6]

The Tribe's assertion (Pet. 13) that the Claims Commission lacked authority to extinguish aboriginal title misses the mark. The Commission was authorized to determine whether Indian title was extinguished by prior events and governmental actions. *Dann*, 706 F.2d at 922. Indeed, the Claims Commission generally has awarded compensation for aboriginal lands only because Indian title had previously been extinguished. See R. Strickland, *F. Cohen's Handbook of Federal Indian Law* 492 (1982). Moreover, Congress's express authorization of payment on the Commission's judgment evinces its acquiescence

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[6] The Ninth Circuit, in *United States* v. *Gemmill*, 535 F.2d 1145, cert. denied, 429 U.S. 982 (1976), determined that the Pit River Indian Tribe's aboriginal title was extinguished on virtually identical facts. The *Gemmill* court found that the federal government had forcibly removed the Indians from their aboriginal lands. 535 F.2d at 1148. This action was by itself "a strong indication of the sovereign's intent to revoke the [Indians'] rights of permissive occupancy." *Ibid.* Also, the government incorporated the Indians' former land into forest reserves and national forests. This action, "after the Indians had been forcibly expelled, leaves little doubt that Indian title was extinguished." *Id.* at 1149. Accord *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-1392 (Ct. Cl. 1975); *Confederated Salish and Kootenai Tribes* v. *United States*, 401 F.2d 785, 789 (Ct. Cl.), cert. denied, 393 U.S. 1055 (1969). Finally, Congress compensated the Indians for their aboriginal land after the Indian Claims Commission ruled that the government had taken their land without compensation. Payment of the claim clearly demonstrated that "Congress had revoked the Indians' rights of permissive occupancy." *Gemmill*, 535 F.2d at 1149. See also *United States* v. *Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1508 (9th Cir.), cert. denied, 112 S. Ct. 415 (1991).

in the Commission's determination in 1969 that the Tribe no longer possessed aboriginal title to the land.

Because the Tribe's aboriginal rights had already been completely extinguished, the Enlargement Act could not have effected a conditional extinguishment of aboriginal rights, nor could it have "preserved" any aboriginal rights to the Tribe.[7] The Enlargement Act also cannot be construed to have reestablished aboriginal title that had previously been extinguished. The Act enlarged the Havasupai Reservation by placing about 185,000 acres in trust for the Tribe. See Pet. App. a-48 to a-49. It designated additional areas for the Tribe's use for specified purposes. 16 U.S.C. 228i(e). The "access" provision in Section 10(c) of the Act, 16 U.S.C. 228i(c), upon which petitioners chiefly rely, states that nothing in the Enlargement Act itself prohibits access to land not otherwise covered by the Act, including the mining site at issue here. That language on its face does not grant the petitioners an affirmative property right or easement, nor does it confer authority to control access or use by others. Rather, Section 228i(c) simply insures

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[7] Petitioners contend that the district court's conclusion that their aboriginal rights had been extinguished prior to the Enlargement Act is implausible because that statute contains an extinguishment provision that would have been unnecessary if the Tribe's rights had previously been extinguished. Pet. 10 (citing 16 U.S.C. 228i(f)). As the district court found (Pet. App. a-45 to a-47), the legislative history of the Enlargement Act suggests that Congress was uncertain about the status of the Havasupai's title to its aboriginal lands. Although "whether or not aboriginal title of the Havasupai had previously been extinguished" was irrelevant to the legislative purpose of the Act, see Pet. App. a-45, Congress appears to have decided to include language affirming the extinguishment of petitioners' aborginal title in order to put the matter to rest.

that the Act will not be construed to *limit* preexisting rights of access to areas not covered by the Act.[8]

Under petitioners' construction, the Enlargement Act would, in effect, grant the Tribe the authority to veto activities on vast tracts of non-trust lands, encompassing millions of acres, to which the Tribe formerly had aboriginal title. There is no indication in the language or legislative history of the Act that Congress intended to accomplish that sweeping result. As the court of appeals pointed out, Pet. App. a-51, the contention that 16 U.S.C. 228i(c) creates an affirmative right of access is refuted by the language of other sections of the Act, which shows that Congress knew how to express its intent explicitly to place land in trust for the benefit of the Tribe and to provide a right of access. See, *e.g.*, 16 U.S.C. 228i(c) ("[T]he Secretary shall have the right of access to any lands hereby included in the Havasupai Reservation."). The court of appeals correctly observed that "[n]o similar grant in trust or affirmative right of access is created by the language [petitioners] cite[]." Pet. App. a-51.

2. The district court properly confined its review of the Forest Service's action to the administrative record. In reviewing final agency action, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency pre-

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[8] The Tribe and other petitioners, as members of the public at large, cannot be denied access to EFN's unpatented mining claims unless EFN shows that access will materially interfere with mining operations. See *United States* v. *Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1286 (9th Cir. 1980). Although the Enlargement Act preserves the Tribe's right of access to the site if consistent with mining activities on the claim, it does not confer the authority to block those activities.

sents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). If the administrative record does not adequately support the decision, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Lorion*, 470 U.S. at 744. The Court should not ordinarily permit probing of the administrator's mental processes beyond what appears in the administrative record. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *Coalition on Sensible Transp., Inc.* v. *Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987); *Warren Bank* v. *Camp*, 396 F.2d 52, 56-57 (6th Cir. 1968).

Petitioners assert that, in arriving at its decision, the agency relied on documents that were not included in the administrative record before the court. Petitioners challenge the requirement that they provide evidence of the agency's "bad faith" in relying on matters outside the record before being permitted to engage in discovery of the materials on which the agency allegedly relied.

Petitioners' challenge is foreclosed by this Court's decision in *Citizens to Preserve Overton Park*, 401 U.S. at 420, in which the Court held that where the agency provides a formal explanation of its decision, an inquiry beyond the record will not be permitted absent evidence of agency bad faith.[9] As the court of

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[9] The requirement that the party seeking discovery provide some basis for believing the record is incomplete is necessary in view of "[t]he ease with which charges of 'bad faith' could be leveled, combined with the inordinate burden resolution of

appeals correctly noted, petitioners failed to provide any support for their contention that the agency relied on documents or materials not included in the record. The court of appeals therefore correctly affirmed the district court's decision to deny further discovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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such claims would entail for courts * * *." *San Luis Obispo Mothers For Peace* v. *NRC*, 751 F.2d 1287, 1327 (D.C. Cir. 1984); see also *Animal Defense Council* v. *Hodel*, 840 F.2d 1432, 1438 (1988), modified, 867 F.2d 1244 (9th Cir. 1989).

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No. 91-1124

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE HAVASUPAI TRIBE, a federally recognized Indian Tribe, et al., Petitioners,

v.

THE UNITED STATES OF AMERICA, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS ENERGY FUELS NUCLEAR, INC. AND ENERGY FUELS EXPLORATION COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Havasupai Tribe has an aboriginal property right of "access" to Forest Service land which was preserved by the Grand Canyon National Park Enlargement Act, 16 U.S.C. § 228, et seq., and which allows the Havasupai Tribe to bar the operation of a mine on valid mining claims in the Kaibab National Forest.

2. Whether, in a suit seeking judicial review of administrative agency action, the district court properly denied petitioners' motion to conduct discovery into matters beyond the administrative record presented to the court.

LIST OF PARTIES

Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company are respondents in this case, in addition to those named in the caption. Both Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company are wholly owned by Energy Fuels Mining Joint Venture. Neither Energy Fuels Nuclear, Inc. nor Energy Fuels Exploration Company has any subsidiaries other than wholly owned subsidiaries.

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BRIEF OF RESPONDENTS ENERGY FUELS NUCLEAR, INC. AND ENERGY FUELS EXPLORATION COMPANY IN OPPOSITION

Respondents Energy Fuels Nuclear, Inc. and Energy Fuels Exploration Company ("Energy Fuels") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 943 F.2d 32 (1991).

STATEMENT OF THE CASE

This case concerns the petitioners' ("the Tribe" or "the Havasupai") attempt to prevent Energy Fuels from completing and operating a mine ("the Canyon Mine") on mining claims it controls in the Kaibab National Forest in Arizona. The Havasupai claim that the mine is located in a sacred religious area. The mine occupies about 17 acres of land, and is 35 miles from the Havasupai Reservation. Pet. App. a-18. During most of this case, the Havasupai's main arguments against the mine were that it would violate their First Amendment right of religious freedom and that the environmental impact statement prepared by the Forest Service for the mine project did not comply with the National Environmental Policy Act ("NEPA"). Pet. 6. They have now abandoned those arguments. Id. ii-iii.

The Tribe's sole remaining substantive argument against the mine is the claim that it violates their asserted aboriginal right of "access" to the mine area. This right is supposedly preserved by the Grand Canyon National Park Enlargement Act. The Havasupai's other argument is procedural. They claim that the district court committed reversible error by not allowing them to conduct open-ended discovery for the purpose of seeing if the administrative record was complete. The district court denied their motion to do discovery because they made no showing of any incompleteness or inadequacy in the record.

The Havasupai lived in a large area south of the Grand Canyon until 1880 when the federal government created the Havasupai Reservation and excluded them from the remainder of what had been their aboriginal land. Pet.

App. a-24, a-26. Subsequently, the Havasupai's aboriginal land (outside of the reservation) was incorporated into a forest reserve (1893), the Coconino National Forest (1908), and the Kaibab National Forest (1934), as well as the Grand Canyon National Park. Id. a-27.

In 1951, the Tribe filed a claim with the Indian Claims Commission, seeking compensation for their aboriginal land which the federal government had taken from them. Id. a-28. The Havasupai declared to the Indian Claims Commission:

> In 1880 the [United States] acquired all of the petitioner's lands outside of its reservation and converted these lands to use by others and deprived petitioner of their title to these lands.

Supp. E.R. A500 (emphasis added).[1] See also Pet. App. a-28.

After a full evidentiary hearing, the Indian Claims Commission ruled in favor of the Havasupai, holding that "by establishing a reservation for the [Havasupai] on June 8, 1980 and March 3, 1882, the United States wrongfully took [Havasupai] aboriginal title lands without payment of compensation therefore . . ." The Havasupai Tribe v. United States, 20 Ind. Cl. Comm. 210, 220 (1968) (quoted in Pet. App. a-29). The Indian Claims Commission further ruled that by its actions, "the [United States] had extinguished the [Havasupai Tribe's] title to [its] lands" outside the Havasupai Reservation. The Havasupai Tribe v. United States,

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[1] Appellees' Joint Supplemental Excerpts of Record, submitted to the Ninth Circuit by Energy Fuels and the Federal Appellees, is hereby referred to as "Supp. E.R. A___."

21 Ind. Cl. Comm. 324 (1969) (Supp. E.R. A515) (emphasis added). Pursuant to the final judgment of the Indian Claims Commission, in 1969 Congress paid compensation to the Havasupai for their land that the federal government had taken from them. Pet App. a-39 to a-40. Energy Fuels' mine is located on land taken by the government in 1880 and for which the Havasupai received compensation from Congress. Id. a-24.

Mining exploration began at the mine site in 1977. Id. a-94. Between 1978 and 1985, substantial exploration work and disruption to the site occurred, including the drilling of 38 exploration holes. Supp. E.R. A420-27. The mine site was also investigated by archeologists in connection with the exploration activity. Pet. App. a-94. "For eight years all exploration activity and archeological work occurred without comment

or expressed opposition by the Havasupai . . . " Id.

In October 1984, Energy Fuels submitted its mining proposal to the Forest Service. Id. Subsequently, an exhaustive investigation into the mine's potential impact on the environment was undertaken and a detailed environmental impact statement ("EIS") was prepared, in compliance with NEPA. Id. a-17 to a-21. The Forest Service communicated frequently with the Havasupai and solicited comments from them, but received virtually no response during most of the NEPA process. Id. a-95 to a-103.

In 1985, Energy Fuels representatives met with Havasupai leaders for two days at Supai Village on the Reservation to discuss the proposed mine in detail. The Havasupai did not say anything at the meeting about the

mine site having any cultural or religious significance. Id. a-100 to a-101.

The Havasupai's only statement during the NEPA process about the mine site's supposed religious significance was the assertion that traditional camps and burial grounds were located in the "area" of the mine. Id. a-104. In response, the Forest Service immediately wrote to the Havasupai asking for more information. The Havasupai never identified any specific religious sites that might be affected by the mine Id. a-106 to a-110.

The Forest Service arranged a meeting with Havasupai representatives at the mine site, but the Tribe cancelled the meeting and it was never held. Id. a-108. The Forest Service also contacted Dr. Robert Euler, an anthropologist familiar with the Havasupai and who had testified on behalf of the Tribe

before the Indian Claims Commission. Dr. Euler had no knowledge of the mine site having any religious or cultural significance for the Havasupai. Id. a-110 to a-111. Archaeological examination of the site in 1985 found no evidence of any religious activity there. Id. a-95 to a-99, a-115 to a-116. Finally, the Forest Service researched the scholarly literature on the Havasupai and found no information indicating that the mine site had any religious significance for the Havasupai. Id. a-112.

Despite the Havasupai's failure to cooperate with the Forest Service on the issue of the mine site's possible religious significance, the final EIS made Indian religious concerns a principal "Issue and Concern" and contained an expanded discussion of Havasupai religious concerns. Id. a-93 to a-94. The final EIS concluded that while the Havasupai

asserted that the mine would adversely affect their religion, there was no evidence of any Indian religious sites at or near the mine. Additionally, the Havasupai refused to identify any specific sites that might be affected by the mine. Id. a-113 to a-116. In September 1986, the final EIS was published and Energy Fuels' modified plan of operations was approved by the Forest Supervisor. Id. a-21.

The Havasupai appealed the Forest Supervisor's decision to the Regional Forester. They also sought a stay of mine development pending the outcome of the appeal. The Tribe participated fully in the appeal, with several members providing oral and written statements on their religious beliefs. Supp. E.R. A378-418. The Havasupai also submitted briefs and consultants' opinions on

environmental issues. e.g., E.R. 187, 208.[2] The Havasupai also had the unrestricted right to submit any additional material they considered relevant. 36 C.F.R. § 211.18(j),(p) (1987). After considering in detail all the issues raised by the Tribe and all information submitted by interested parties, the Regional Forester upheld with minor modification the Forest Supervisor's decision. E.R. 164-86; Pet. App. a-21 to a-22.

The Havasupai also pursued their request for a stay of mining activities at the mine. The Regional Forester and then the Chief of the Forest Service considered the stay request. Pet. App. a-22. The Tribe fully briefed and argued the stay issue at both levels. The Havasupai also provided oral statements about their religion and other

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2 The Excerpts of Record, which the Havasupai submitted to the Ninth Circuit, is herein referred to as "E.R. ___."

documentary evidence in support of their stay request. Supp. E.R. A232-342. Again, there was no limit on what oral or written submissions could be presented by the Havasupai.

The Regional Forester granted a partial stay, prohibiting underground drilling, but permitting surface construction. Pet. App. a-22. Subsequently, the Chief, affirmed the Regional Forester's partial stay, in a long written decision, which considered in detail the Havasupai's claims on the merits. Supp. E.R. A343-77; Pet. App. a-22.

The Havasupai pursued their appeal on the merits to the Chief of the Forest Service. In support of their appeal, they filed briefs and submitted additional materials. On June 9, 1988, in a detail decision that carefully considered the issues raised by the Havasupai, the Chief of the Forest Service approved the modified plan of operations for

the mine. E.R. 476-96. The Havasupai then filed suit in the United States District Court, seeking judicial review of the Chief's final decision. Pet. App. a-22 to a-23.

REASONS WHY THE PETITION SHOULD BE DENIED

I. There is No Conflict Between the Ninth Circuit's Decision and Decisions of this Court.

Petitioners assert that the Ninth Circuit's decision somehow conflicts with decisions of this Court with respect to extinguishment of Indian title. Pet. 13-14. There is no basis to this assertion. Petitioners attempt to create a supposed conflict by misstating this Court's holding on extinguishment of Indian title and also the holdings of the District Court and the Ninth Circuit on the extinguishment of the Havasupai's aboriginal title in this case.

Indian or aboriginal title is a permissive right of occupancy recognized by the

federal government. Pet. App. a-25. Contrary to the assertion of petitioners, this Court has never held that Congress has the exclusive power to extinguish aboriginal title. Pet. 14. Rather, this Court has held that while Congress' power to extinguish aboriginal title is "supreme," the federal government may extinguish aboriginal title through a variety of means, including:

> [B]y treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise. . .

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 347 (1941) (cited and mischaracterized at Pet. 14).

The District Court and the Ninth Circuit held that the Havasupai's aboriginal title to the land at issue was extinguished through several of the means identified by this Court in Santa Fe Pacific Railroad: First, "by the sword," when the Tribe was removed to the

reservation and excluded from the remainder of what had been its aboriginal land[3]; second, "by the exercise of complete dominion adverse to the right of occupancy," when the federal government established a series of forest reserves, national forests, a national monument and a national park on what had been Havasupai land, and finally, "by purchase," when Congress paid compensation to the Havasupai for their aboriginal land that the federal government had taken. Pet. App. a-12 to a-13; a-23 to a-35.

Thus there is no conflict between this Court and the Ninth Circuit.

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3 The Havasupai declared to the Indian Claims Commission that federal civil and military authorities "threatened [tribal members] with loss of life" and also "killed or forcibly evicted" them from their aboriginal lands, and thereby coerced the Tribe onto the reservation. Supp. E.R. A492.

II. Petitioners' Aboriginal Rights Were Extinguished Before the Grand Canyon Enlargement Act Was Enacted.

Petitioners claim that their aboriginal rights were not extinguished until the Grand Canyon Enlargement Act was passed in 1975. This argument ignores the actual history of the land at issue, congressional action, and petitioners' own testimony. As pointed out above, the Havasupai petitioned the Indian Claims Commission for compensation precisely because their title had already been extinguished: "In 1880 the [United States]. . . deprived petitioner of their title to these lands." p.4, supra.

Federal ownership and control of the land at issue was subsequently confirmed by no less than 13 statutes and executive orders between 1893 and 1934 that established a forest reserve, national forests, a national monument, and a national park on the land.

Supp. E.R. A494; Pet. App. a-27 to a-28. On the basis of the above facts, the Indian Claims Commission determined that the Havasupai's aboriginal title had been extinguished. Pet. App. a-29.

Petitioners attempt to escape the consequences of these facts and the Indian Claims Commission decision by asserting that the Indian Claims Commission did not have authority to extinguish Indian title. Pet. 9, 14. This argument misses the point because the Commission did not extinguish petitioners' aboriginal title, but determined that it had already been extinguished, thus entitling them to compensation.[4] Pet. App. a-29.

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[4] The Havasupai would not have been entitled to compensation had their aboriginal rights not been extinguished. United States v. Gemmill, 535 F.2d 1145, 1149 n.6. (9th Cir.) cert. denied sub nom. Wilson v. United States, 429 U.S. 982 (1976) (Indian tribe's "compensation claim [to the Indian Claims Commission] was, of course, premised upon an extinguishment.").

Congress set up the Indian Claims Commission in 1946 and delegated to it "the responsibility for determining the merits of native American claims" in order to relieve itself "of the burden of having to resolve these claims." United States v. Dann, 470 U.S. 39, 45, 47 (1985). The Commission was given "extremely broad jurisdiction" to hear Indian "claims of every type, shape and variety" against the federal government. United States v. Seminole Nation 173 F.Supp. 784, 789 (Ct. Cl. 1959); Klamath and Modoc Tribe v. United States, 174 Ct. Cl. 483, 488-89 (1986). See also Pet. App. a-35 to a-37.

Among the claims the Commission had authority to "hear and determine" were "claims arising from the taking by the United States. . . of lands owned or occupied by. . . any Indian tribe." 25 U.S.C. § 70a (the Commission was terminated on September

30, 1978). The Commission determined the amount of compensation, if any, to be awarded in each case. 25 U.S.C. § 70r. Payment by Congress of compensation in a case constituted "full discharge" of all claims and demands against the government in any way related to the case. 25 U.S.C. § 70u(a).

Congress' "chief purpose" in establishing the Commission was to have Indian claims resolved "with finality." Dann, 470 U.S. at 45 (citation omitted). It is thus clear that Congress gave the Commission the authority to determine whether Indian title was extinguished in a given case, and intended the Commission's decision on the matter to be final (subject to review by the Court of Claims). 25 U.S.C. §70s(b). Accordingly, there is no merit to petitioners' attack on the decision of the Commission.

After the Commission determined that petitioners' Indian title had been extinguished, Congress in 1969 acted directly on the matter by appropriating and paying compensation to the Tribe for the land the government had taken. Pet. App. a-12, a-30. This action by Congress clearly extinguished petitioners' aboriginal title even if it had not been extinguished before.[5]

The Ninth Circuit and the District Court properly found that petitioners' aboriginal title was extinguished prior to the Grand Canyon Enlargement Act. Contrary to petitioners' assertion, neither court held that the Indian Claims Commission had extinguished the Havasupai's aboriginal rights. Pet. 14.

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5 United States v. Pend Oreille Public Utility District, 926 F.2d 1502, 1508 (9th Cir. 1991) ("[P]ayment of a Commission award of compensation for a taking of aboriginal lands conclusively establishes that the aboriginal title has been extinguished."); accord Gemmill, 535 F.2d at 1149; United States v. Dann, 873 F.2d 1189, 1194 (9th Cir. 1989).

Rather, both courts held that petitioners' aboriginal title was extinguished through multiple means, but, in any case, no later than 1969 when Congress, by statute, compensated the Tribe for the land at issue. Id. a-12, a-26 to a-30. Thus, even if petitioners' were correct in asserting that only Congress can extinguish aboriginal title, their aboriginal rights to the land at issue would still have been extinguished before the Grand Canyon Enlargement Act.

III. Petitioners' Access Claim is Barred as a Matter of Law.

Because petitioners were paid by Congress for the land the federal government had taken from them, their access claim is statutorily barred. The Indian Claims Commission Act provides:

> The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the

> matters involved in the controversy. 25 U.S.C. § 70u(a).

Petitioners' current right of access claim clearly "touches" a matter involved in their prior case before the Indian Claims Commission because the mine site is within the area of land that was in controversy in that proceeding. Pet. App. a-40 to a-41. Accordingly, petitioners' access claim to the mine site is statutorily barred. United States v. Dann, 470 U.S. at 45 (payment of compensation under 25 U.S.C. § 70u(a) has "preclusive effects" on any claims that "touch" a "matter previously litigated and resolved by the Indian Claims Commission.")

Petitioners' access claim is also barred by the principle of res judicata because petitioners stipulated in the final judgment of the Indian Claims Commission that they would be barred from asserting any claim with respect to their aboriginal land which they

asserted or could have asserted in that proceeding.

> Entry of final judgment in said amount shall finally dispose of all rights, claims or demands which the petitioner has asserted or could have asserted with respect to the subject matter of Docket No. 91, and petitioner shall be barred thereby from asserting any such right, claim or demand against defendant in any future action.

21 Ind. Cl. Comm. at 337 (quoted at Pet. App. a-42). Because petitioners' current claim was or could have been asserted in their proceeding before the Indian Claims Commission, the claim is now barred.

IV. The Grand Canyon Enlargement Act Does Not Guarantee Petitioners a Right of Access to the Mine Site.

By ignoring the clear meaning of the statute and by substituting an elaborate "implied" meaning, petitioners declare that the Grand Canyon Enlargement Act preserves for them an aboriginal right of access to the mine site. Pet. 23. This alleged right

supposedly rises to the level of an "easement," giving petitioners the power to prohibit Energy Fuels from mining on its own mining claims because "access by Tribal members and [Energy Fuels] cannot coexist." Petitioners' Opening Brief to the Ninth Circuit at 28, 31. Petitioners' argument is without merit.

The Grand Canyon Enlargement Act expanded the Grand Canyon National Park, enlarged the Havasupai Reservation, and designated a portion in the Park as a Havasupai use area. The mine site was not included in any of these changes. The provision of the Act relied on by petitioners states:

> Nothing in Sections 228a to 228j of this title shall be construed to prohibit access by any members of the tribe to any sacred or religious places or burial grounds, native foods, paints, materials and medicines located on public lands not otherwise covered in Sections 228a to 228j of this title.

16 U.S.C. § 228i(c) (1988 Supp.). As the language clearly indicates, this provision simply states that the Act is not to be used to prohibit Havasupai access to areas of public land. Beyond stating how the Act is not to be used, the provision is silent on the issue of access. The provision does not grant the Havasupai access of any kind, nor does it even mention an alleged "right" of access.[6] Moreover, by stating that it should

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[6] The District Court pointed out that petitioners' implied "access" meaning is particularly improbable in light of other sections of the Act that expressly and directly grant rights to public lands:

> Congress knew how to create land in trust for the benefit of the Havasupai. Section 228i(a) provides that lands "are hereby declared to be held by the United States in trust for the Havasupai Tribe." Congress also knew how to create a right of access. The sentence immediately preceding the disputed sentence in § 228i(c) states that "the Secretary shall have the right of access to any lands hereby included in the Havasupai Reservation." No similar grant in trust or affirmative

Footnote continued on next page.

not be construed to prohibit access, the Act clearly permits access to be denied on any other ground, including other statutes, common law principles, and the rights of others.

The District Court carefully reviewed the legislative history of the Act and concluded that the provision in question is simply a statement of statutory neutrality on the issue of Havasupai access to areas of public land other than those covered by the Act.[7] Pet. App. a-50. The legislative

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Footnote continued from previous page.

> right of access is created by the language plaintiff sites. Pet. App. a-51.

[7] Petitioners claim that the Ninth Circuit's affirmance of the District Court contradicts an earlier decision of its own. Pet. 11. This is incorrect. The Ninth Circuit simply observed that another provision of the Act reserved an area of the Park for use by the Havasupai. Northwest Indian Cemetary Protective Ass. v. Peterson, 795 F.2d 688, 694 n.8 (9th Cir. 1986), rev'd sub nom., Lyng v. Northwest Indian Cemetary Protective Ass., 485 U.S. 439 (1988).

history indicates that the statement of statutory neutrality was called for due to past friction between the Havasupai and some agencies of the federal government. Id. a-50 to a-51. There is simply no basis in either the statutory language or the legislative history for petitioners' claim that the Act guarantees them right of access to the mine site.

Petitioners attempt to use the "extinguishment" provision of the Act to support their access claim. Pet. 13. Again, there is no merit to petitioners' argument. The extinguishment provision states that all right, title and interest of the Havasupai to lands not held in trust for them or otherwise covered by the Act are extinguished. 16 U.S.C. § 228(i)(f). The legislative history makes clear that this provision has nothing to do with any alleged right of access to the mine site.

At the time Congress was considering enlarging the Park, petitioners lobbied to have their reservation increased by some 251,000 acres. Pet. App. a-46. This area did not include the mine site. Id. at a-45, a-49. Congress was aware that petitioners were claiming that they still had an aboriginal right to this land because they used it for grazing after the 1969 decision of the Indian Claims Commission. H.R. Rep. No. 1374, 93rd Cong., 2d Sess. 9 (Sept. 25, 1974). Congress never acknowledged any legitimacy to the Havasupai's claim, although there was discussion about it.[8] In any case, the Tribe's argument made no sense because,

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8 Congress treated the issue as moot because, "[w]hether or not title was extinguished," Congress "can enlarge any Indian reservation, if it chooses to do so." Id. Congress enlarged the Havasupai Reservation because tribal members were judged to need more land, not because of their aboriginal rights argument. 120 Cong. Rec. 35,195 (1974).

as the District Court noted, tribal members were using the land (which did not include the mine site) on the basis of government grazing permits, not because of any supposed aboriginal rights. Pet. App. a-46.

Congress granted the Havasupai much, but not all of the land they claimed, by adding 185,000 acres to the Havasupai Reservation. An area in the Park was also designated as a Havasupai use area. Id. a-48 to a-49. Because the Havasupai did not receive all the land they claimed to be theirs by aboriginal right, Congress wished to make clear it would not recognize any future claims by the Havasupai to the remaining area. Accordingly, Congress stated that any claims by the Havasupai to the land were extinguished. As pointed out above, none of the land claimed by the Havasupai included the mine site. P. 28, supra. Accordingly, the

extinguishment provision cannot possibly provide any support for petitioners' current access claim to the mine site.

V. The District Court Properly Limited Judicial Review to the Administrative Record.

The Administrative Procedures Act provides that judicial review of agency action is to be based on the administrative record, even where it is alleged that the agency acted "not in accordance with law [or] contrary to constitutional right." 5 U.S.C. § 706. Numerous decisions of this Court have stressed that a reviewing court should base its decision on the existing administrative record, and not on some new record made initially in the court proceeding. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Camp v. Pitts, 411 U.S. 138, 142 (1973); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). In the instant case, the administrative record is

over 5,000 pages in length and includes the Forest Service's final decision that devotes 21 pages to explaining the basis of the agency's decision. Supp. E.R. A538; E.R. 476.

The sole question raised by petitioners is whether they are required to make "a showing of agency bad faith" to be entitled to do discovery beyond the administrative record. Pet. iii. This Court has already answered petitioners' question. Overton Park holds that when an agency provides a formal factual explanation of a decision at the same time the decision is issued, "there must be a strong showing of bad faith or improper behavior" before any inquiry beyond the record will be permitted. 401 U.S. at 420. In the instant case, the Forest Service provided a clear, detailed explanation of its decision (E.R. 476-96), and petitioners have

not shown or attempted to show any agency bad faith. Pet. App. a-9.

Petitioners claim that the record that was before the District Court was not the complete administrative record. Pet. 24-25. There is no merit to this allegation. The Declaration of Bronson LaMoure explains that he assembled the administrative record, containing all the documents that were part of the administrative process. Supp. E.R. A535. The administrative record contains, among other things, both the final and draft EIS and all the underlying reports, technical studies, comments, and agency responses. E.R. 617-787. Over 42 documents that predate the EIS are included in the administrative record. Supp. E.R. A480-83. All the documents that were part of petitioners' two administrative appeals, including pleadings, factual statements, expert opinions, and the

decisions and statements of the agency, are also included in the administrative record. Id. A536-39.

David Unger, the author of the Forest Service's final decision, explains in his Declaration that "[i]n reaching [his] June 9, 1988 decision," he "relied exclusively on information that was in the administrative record that was complied by [Bronson LaMoure] and that was filed in this litigation." Supp. E.R. A479. In other words, the only documents that the agency's final decisionmaker looked at or considered in reaching his decision are contained in the administrative record that was before the District Court. Thus it is clear that administrative record contains the complete record of this case, from the Energy Fuel's initial

proposal to the final decision of the agency.[9]

The District Court did not deny petitioners an opportunity to take discovery as petitioners now claim. Pet. 4, 5, 7. The District Court made clear that it would permit discovery if petitioners could satisfy any one of four grounds for discovery by showing: (1) that the record does not explain the agency's decision, (2) that it appears that the agency relied on materials not included in the record, (3) that discovery is necessary to explain technical terms, or (4) that there is bad faith or improper

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9 Petitioners attempt to create the impression that documents are missing from the administrative record by referring to a 1988 letter from the Forest Supervisor to petitioners' counsel. Pet. 27. The Forest Supervisor simply states that his office has file drawers of documents. He does not identify or count the documents, though he explains that they are duplicative of documents in the administrative record. See Ex. B to petitioners' Reply Brief to Ninth Circuit. This letter does not indicate any incompleteness in the administrative record.

behavior by the agency. Order of July 28, 1988 at pp. 4-5. See Animal Defense Council v. Hodel, 840 F.2d 1432, 1436-37 (9th Cir. 1988), modified, 867 F.2d 1244 (9th Cir. 1989).

After full briefing and oral argument, the District Court determined that petitioners had failed to satisfy any of the above grounds. Order of July 28, 1988 at 5. Nonetheless, the District Court did not prohibit discovery by petitioners. Rather, it ruled that it would still permit discovery upon "adequate justification for the particular discovery request." Id. at 6.

Petitioners never requested to take any particular discovery. Rather, they filed a motion to take general discovery at all levels of the Forest Service. Order of September 7, 1988 at 3 (Supp. E.R. A486). The District Court denied petitioners' motion

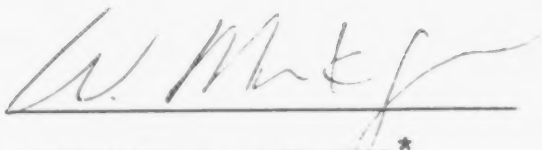
because they "failed to demonstrate any specific deficiency in the record as filed nor have they established any other basis upon which to permit discovery." Id. The Ninth Circuit affirmed on the ground that petitioners' argument for needing to do discovery was "purely speculative" and without any support. Pet. App. a-9.

Thus it is clear that judicial review was properly limited to the administrative record.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:



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